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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 3, 2019

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 15 AUGUST 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ELIZABETH BALL, EMPLOYEE, PLAINTIFF
v.
BAYADA HOME HEALTH CARE, EMPLOYER, ARCH INSURANCE GROUP, INC., CARRIER
(GALLAGHER BASSETT SERVICES, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA16-1219

Filed 15 August 2017

Workers' Compensation—temporary total disability benefits—average weekly wage—method of calculation—fair and just

The Industrial Commission erred in a workers' compensation case by utilizing Method 3 set out in N.C.G.S. § 97-2(5) to calculate plaintiff's average weekly wage for temporary total disability benefits. The method was not "fair and just" as required by the statute since it ignored an undisputed fact of the employee's employment and the case was remanded to the Commission to utilize Method 5 to appropriately consider plaintiff's post-injury work.

Appeal by Plaintiff from opinion and award entered 16 August 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 May 2017.

Ganly & Ramer PLLC, by Thomas F. Ramer, for Plaintiff-Appellant.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, for Defendants-Appellees.

McGEE, Chief Judge.

Elizabeth Ball ("Plaintiff") appeals from a final decision of the North Carolina Industrial Commission ("the Commission"). The Commission utilized a particular method set out in N.C. Gen. Stat. § 97-2(5) – Method 3 – to calculate Plaintiff's average weekly wage for her temporary total disability benefits. We conclude that use of Method 3 was not "fair and just" to Plaintiff, a requirement of N.C.G.S. § 97-2(5). Accordingly, we reverse and remand to the Commission for calculation of Plaintiff's benefits using the appropriate statutory method.

I. Background

Plaintiff began her employment as a certified nurse's assistant with Bayada Home Health Care ("Bayada") on 26 May 2010. Plaintiff worked on a part-time basis for Bayada from 26 May 2010 until 30 November 2010, when she began to work a full-time schedule. During this time in her employment, Plaintiff earned $8.00 per hour. In February 2011, Plaintiff was transferred from Bayada's Asheville office to its Hendersonville office, where she began working with a single, specific client ("the client"). As a result of this change, Plaintiff began working an increased number of hours, and at an increased wage – $10.00 per hour. On Plaintiff's first day of work with the client at the higher hourly rate, 10 February 2011, Plaintiff was injured when the client, who suffered from Alzheimer's, pushed Plaintiff down several stairs.

Plaintiff sought medical treatment for her injuries that same day and was released to limited duty work. Three days later, Plaintiff requested a release for full work duty and was granted such by her medical care provider. Despite her 10 February 2011 injury, Plaintiff continued to work for the client, with the attendant increase in hours and rate of pay, through 18 May 2011. On that date, Plaintiff alleged, she suffered a second injury while working with the client.

Plaintiff filed a Form 18 on 20 March 2012 informing Bayada, its insurance carrier Arch Insurance Group, Inc., and the third-party administrator, Gallagher Bassett Services, Inc. (together, "Defendants") of her 10 February 2011 incident. In the Form 18, Plaintiff claimed injuries to her left hand, both knees, and right hip from the 10 February 2011 incident. Plaintiff filed a second Form 18 on the same day, informing Defendants of the alleged 18 May 2011 incident, and claimed injuries in that incident to both of her knees. Defendants admitted the compensability of Plaintiff's 10 February 2011 injury to her right leg, but denied the compensability of the injuries to her hips and hands. Defendants also denied compensability of all injuries stemming from the 18 May 2011 incident. Despite denying the compensability of Plaintiff's alleged 18 May

2011 injuries, Defendants filed a Form 60 on 10 June 2011, admitting Plaintiff's "disability resulting from the injur[ies] began on" 19 May 2011.

Plaintiff filed a Form 33 on 31 May 2012, requesting that her disability claim be assigned for hearing, and a hearing was held before a deputy commissioner on 26 May 2015. Following that hearing, the deputy commissioner filed an opinion 16 August 2012 concluding as a matter of law that Plaintiff suffered compensable injuries on both 10 February 2011 and 18 May 2011. The deputy commissioner also determined that the appropriate method to determine Plaintiff's average weekly wage was Method 5, as listed in N.C.G.S. § 97-2(5), which resulted in an average weekly wage of $510.33 and a corresponding weekly compensation rate of $340.24 for Plaintiff's temporary total disability payments. Defendants appealed to the Commission.

Upon its *de novo* review, the Commission concluded as a matter of law that, *inter alia*: (1) Plaintiff had suffered a compensable injury on 10 February 2011; (2) there was not sufficient, competent evidence of Plaintiff's being injured on 18 May 2011; (3) Plaintiff's disability began on 19 May 2011; and (4) Plaintiff had ongoing medical treatment needs. The Commission concluded as a matter of law that Methods 1, 2, and 4, as listed in N.C.G.S. § 97-2(5), were inapplicable to the facts of the present case, and as such that "utilization of [M]ethod [3] for calculation of average weekly wage" applied to Plaintiff's claim.

The Commission determined that, applying Method 3, Plaintiff was entitled to "an average weekly wage of $284.79 with a compensation rate of $189.87." The Commission further found that "calculation of [P]laintiff's average weekly wage using [Method 3] [was] fair and just to both [P]laintiff and [D]efendants." Plaintiff appeals.

II. Analysis

Plaintiff contends the Commission erred in utilizing Method 3 in N.C.G.S. § 97-2(5) because use of that method is not "fair and just" to her, as required by that statute. Our review of an opinion and award of the Industrial Commission "is limited to a determination of whether the Full Commission's findings of fact are supported by any competent evidence, and whether those findings support the Full Commission's legal conclusions." *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). The Commission's conclusions of law are reviewable *de novo*. *Id.* Findings of fact not challenged are binding on appeal. *See Strezinski v. City of Greensboro*, 187 N.C. App. 703, 707, 654 S.E.2d 263, 266 (2007). Plaintiff only challenges the trial court's finding and

conclusion that utilization of Method 3 to calculate her average weekly wages was "fair and just" to her.

"In North Carolina, the calculation of an injured employee's average weekly wages is governed by N.C. Gen. Stat. § 97-2(5)." *Conyers*, 188 N.C. App. at 255, 654 S.E.2d at 748. N.C.G.S. § 97-2(5) "sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 459, 665 S.E.2d 449, 451 (2008) (citation omitted). As relevant to the present case, N.C.G.S. § 97-2(5) provides:

> [Method 1:] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . , divided by 52;
>
> . . . .
>
> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; *provided, results fair and just to both parties will be thereby obtained.*
>
> . . . .
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

N.C. Gen. Stat. § 97-2(5) (2015) (emphasis added).

The "dominant intent" of N.C.G.S. § 97-2(5) "is to obtain results that are fair and just to both employer and employee." *Conyers*, 188 N.C. App. at 256, 654 S.E.2d at 748 (citing *Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966)). The words "fair and just"

> may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just,

> within the meaning of [N.C.G.S. § 97-2(5)],[1] consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury.

Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis in original).

Plaintiff argues that use of Method 3 to calculate her average weekly wage was not "fair and just" to her. Use of Method 3, she argues, only takes into account the part-time work she completed at a lower hourly rate, and ignores the uncontested fact that she worked, post-injury, at a higher hourly wage and frequency. We agree. Plaintiff began work with Bayada on 26 May 2010 and was injured some nine months later, on 10 February 2011. During that time period, Plaintiff worked part-time and was paid an hourly rate of $8.00, and earned $3,215.25 over a period of 79 days. On the day Plaintiff was injured, she had begun to work with a new Bayada client, which required her to work increased hours and she earned a higher rate of pay – $10.00 per hour, two dollars per hour more than she had previously earned. Plaintiff continued working the increased hours at the increased rate of pay for more than three months, from the date of her injury until 18 May 2011, the date of her alleged second injury.

We hold that only taking into account Plaintiff's pre-injury compensation, through use of Method 3, is unfair to Plaintiff, as it ignores the months of increased hours and pay Plaintiff worked after her 10 February 2011 injury, and would effectively treat Plaintiff as if she had never worked increased hours at a higher rate of pay. We must reject the use of Method 3 on the facts of the present case, as use of that method "squarely conflicts with the statute's unambiguous command to use a methodology that 'will most nearly approximate the amount which the injured employee would be earning were it not for the injury.' " *Tedder v. A&K Enters.*, 238 N.C. App. 169, 175, 767 S.E.2d 98, 103 (2014) (quoting N.C.G.S. § 97-2(5)). Defendants admitted that Plaintiff was disabled as a result of her 10 February 2011 injury. In order to "most nearly approximate" what Plaintiff would be earning if she had not been injured, we believe that Plaintiff's post-injury work must be taken into account.

Defendants main argument in response is that, due to the nature of Plaintiff's employment, there was no certainty that Plaintiff would have continued to earn higher wages with increased hours but for her

1. *Liles* cited to N.C. Gen. Stat. § 97-2(e) (1956), the predecessor statute and section to the present-day N.C.G.S. § 97-2(5).

injury. As support for this argument, Defendants point to the hearing testimony of Plaintiff's supervisor at Bayada, Elizabeth Kader ("Kader"). Kader generally testified that Bayada employees each had different schedules, and that some employees "work six different clients every week" while others "work the same client every single week fifty-two weeks out of the year." From this testimony, Defendants suggest there was no certainty that Plaintiff would continue to work increased hours at a higher hourly rate. While it is certainly true that there was no absolute assurance that Plaintiff would continue to work increased hours at a higher rate of pay, this uncertainty is no different than the uncertainty found in any at-will employment.[2] On the unique facts of the present case, we need not speculate about whether Plaintiff would have worked increased hours and pay for at least some period of time after her 10 February 2011 injury, as evidence in the record proves that she did. It is undisputed that, after Plaintiff's 10 February 2011 injury, she worked for more than three months at the increased hours and pay – a fact that application of Method 3 unfairly ignores.

We find instructive cases in which this Court and our Supreme Court determined that use of Method 3 was not "fair and just." In *Joyner*, an injured truck driver worked on an as-needed basis during the 52 weeks prior to his injury. *See Joyner*, 266 N.C. at 519, 146 S.E.2d at 450. Our Supreme Court described the employee's work as "inherently part-time and intermittent" and held it was unfair "to the employer . . . [not to] take into consideration both peak and slack periods" in calculating average weekly wages. *Id.* at 522, 146 S.E.2d at 450. As a result, the Court held that the employee's average weekly wage should have been calculated pursuant to Method 5. *Id.*

In *Conyers*, a school bus driver for a public school system suffered a compensable injury during the course of her employment. *Conyers*, 188 N.C. App. at 254, 654 S.E.2d at 747. Since the employee only worked the previous ten months of the year, due to school bus drivers not working during a school's summer recess, the Commission utilized Method 3 to calculate the employee's average weekly wage. *Id.* at 255, 654 S.E.2d at 747. This Court determined that use of Method 3 was not "fair and just as [the employer] would be unduly burdened while [the employee] would

2. The facts of this case are decidedly unlike those in *Tedder*, where the employee was "a temporary employee hired to work for a limited time period of seven weeks." *Tedder*, 238 N.C. App. at 172, 767 S.E.2d at 101; *see also id.* at 176, 767 S.E.2d at 103 ("[I]n calculating average weekly wages for employees in temporary positions, the Commission must consider the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period.").

receive a windfall. The purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." *Id.* at 259, 654 S.E.2d at 750. This Court reversed and determined that use of Method 5 to calculate the bus driver's average weekly wage "most nearly approximat[ed]" the amount the bus driver would have earned "were it not for her injury." *Id.* at 261, 654 S.E.2d at 751-52.

It is worth noting that the Courts in *Joyner* and *Conyers* found use of Method 3 would be unfair and unjust to the employ*er*, while we find that use of Method 3 in the present case to be unfair and unjust to the employ*ee*. Such a finding is not barred, but is instead explicitly contemplated, by the relevant statute. N.C.G.S. § 97-2(5) (stating that Method 3 may be utilized "provided [that] results fair and just to *both parties* will be thereby obtained"). The common thread running through the cases we have examined is that a method of average weekly wage calculation may not be used when use of that particular method would ignore an undisputed fact of the employee's employment.

Use of Method 3 in *Joyner* was inappropriate when use of that method would have ignored the fact that the employee's work was "inherently part-time and intermittent." *Joyner*, 266 N.C. at 522, 146 S.E.2d at 450. Method 3 was equally inappropriate when use of that method would have ignored the fact that a bus driver only worked ten months out of the year and Method 3 would treat her as if she worked all twelve months. *Conyers*, 188 N.C. App. at 259, 654 S.E.2d at 750. And, in the present case, the use of Method 3 is equally inappropriate, where use of that method ignores the uncontroverted evidence that Plaintiff worked for months after her 10 February 2011 injury at a higher frequency and at a higher rate of pay. Method 3 does not "most nearly approximate the amount which [Plaintiff] would be earning were it not for the injury," *Tedder*, 238 N.C. App. at 175, 767 S.E.2d at 103 (citation omitted), and thus its use is not "fair and just" to Plaintiff as required by N.C.G.S. § 97-2(5).

III. Conclusion

For the reasons stated, the Commission erred in utilizing Method 3 to calculate Plaintiff's average weekly wage. The opinion and award of the Commission is reversed, and this case is remanded to the Commission for a determination of Plaintiff's average weekly wages utilizing Method 5, and appropriately considering Plaintiff's post-injury work.

REVERSED AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

C. TERRY HUNT INDUSTRIES, INC., PLAINTIFF
v.
KLAUSNER LUMBER TWO, LLC, DEFENDANT

No. COA16-1136

Filed 15 August 2017

Appeal and Error—interlocutory orders and appeals—arbitration order—no substantial right

Plaintiff company's appeal from an interlocutory order compelling arbitration in a claim for breach of a preliminary agreement for a construction project was dismissed. An order compelling arbitration does not affect a substantial right and does not fall within the enumerated grant of appellate review under N.C.G.S. § 1-569.28.

Judge INMAN concurring in separate opinion.

Appeal by plaintiff from orders entered 31 May 2016 and 17 June 2016 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 19 April 2017.

Hamilton Stephens Steele + Martin, PLLC, by Nancy S. Litwak and Erik M. Rosenwood, for plaintiff-appellant.

Nexsen Pruet, PLLC, by David S. Pokela and Eric H. Biesecker, for defendant-appellee.

BERGER, Judge.

C. Terry Hunt Industries, Inc. ("Hunt") appeals from the order filed on May 31, 2016 granting the motion to compel arbitration made by Klausner Lumber Two, LLC ("Klausner"). Hunt also appeals from the order filed on June 17, 2016 denying both the motion to reconsider the order granting the motion to compel arbitration, and the motion to alter or amend the order. The interlocutory order compelled arbitration in Hunt's lawsuit claiming breach of a preliminary agreement for a construction project. Hunt argues that interlocutory review is proper because the order affects a substantial right. We disagree and dismiss the appeal.

Factual & Procedural Background

On August 19, 2014, Hunt and Klausner entered into a Preliminary Contract Agreement and Authorization to Proceed (the "Preliminary Agreement"). In the Preliminary Agreement, Hunt agreed to provide the materials and labor necessary to construct a sawmill on property owned by Klausner in Halifax County, North Carolina (the "N.C. Project"). The Preliminary Agreement preceded the anticipated execution of a contract (the "N.C. Contract") that would set the terms and conditions for the N.C. Project.

The Preliminary Agreement incorporated the contract used by the parties for a prior sawmill construction project completed in Live Oak, Florida (the "F.L. Contract"). This agreement provided, in pertinent part:

> 1.2 WHEREAS [Klausner] hereby intends to engage [Hunt] to undertake and perform all Work . . . in accordance with the [N.C.] Contract Documents for [Klausner's] [N.C. Project], including the obligations and related liabilities as defined in the [N.C.] Contract, and [Hunt] has agreed to such engagement upon and subject to the terms and conditions of the [N.C]. Contract[.]
>
> . . . .
>
> 2.1 In this Agreement, words and expressions shall have the same meanings as are respectively assigned to them in the [N.C.] Contract. The form and language of the [N.C.] Contract . . . shall be based on that used previously by the Parties for the Sawmill Project located in Live Oak, Florida. References in this Agreement to specific Articles or language to be included in the [N.C.] Contract shall refer to those same Articles and language included in the [F.L. Contract].

Additionally, the parties agreed that work on the N.C. Project would commence once the Preliminary Agreement was executed, prior to the completion of any other documents pertaining to the N.C. Contract. However, pursuant to the Preliminary Agreement, once the remaining N.C. Contract documents were agreed upon by the two parties, "they shall, along with [the Preliminary Agreement], constitute the [N.C. Contract] Documents."

The F.L. Contract, the form and language of which the parties agreed would form the basis of the N.C. Contract, contained a three-step dispute

resolution procedure in Sections 13.11-13.13. This procedure was enumerated in the F.L. Contract as follows:

> 13.11 Direct Discussions. If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives . . . . If the Parties' representatives are not able to resolve such matter . . . senior executives of the Parties shall meet . . . to endeavor to reach resolution. If the dispute remains unresolved . . . the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures . . . herein.
>
> 13.12 Mediation. If direct discussions . . . do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association . . . .
>
> 13.13 Binding Dispute Resolution. If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure designated herein[,] Arbitration[,] using the current Construction Industry Arbitration Rules of the American Arbitration Association . . . .

From approximately October 27, 2014 until February 10, 2015, Hunt and Klausner attempted to negotiate the remaining terms of the N.C. Contract. However, negotiations stalled and no additional terms or documents were agreed upon by the parties. Instead of submitting the dispute to mediation, and then, if still unresolved, to arbitration, the parties moved toward litigating their dispute.

On November 24, 2015, Hunt filed a complaint against Klausner alleging breach of contract, quantum meruit, and enforcement of lien on property. In response to Hunt's complaint, Klausner filed a motion to dismiss, and an alternative motion to stay litigation and compel arbitration.

Following a hearing, the trial court filed an order on May 31, 2016 that granted Klausner's motion to stay litigation and compel arbitration. The trial court not only concluded that the parties had a valid and applicable arbitration agreement, but it also found that the "Preliminary Agreement incorporates by reference all the terms and conditions of the Florida Contract."

Hunt filed a motion to reconsider the order granting the motion to stay litigation and compel arbitration, and an alternative motion to alter or amend the order compelling arbitration. Both motions were denied by the trial court in an order filed June 17, 2016. It is from the May 31 and June 17 orders that Hunt appeals.

Analysis

Pursuant to N.C. Gen. Stat. § 1-569.6(b), in order to determine the validity of an arbitration agreement, "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." N.C.G.S. § 1-569.6(b) (2015). "Once a court has determined that a claim is subject to arbitration, then the merits of that claim . . . must be decided by the arbitrator." *State v. Philip Morris USA, Inc.*, 193 N.C. App. 1, 18, 666 S.E.2d 783, 794 (2008), *writ denied, review denied*, 676 S.E.2d 54 (2009) (citing *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) ("Courts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." (brackets and quotation marks omitted)), *cert denied*, 503 U.S. 919, 117 L. Ed. 2d 516 (1992)).

As a general principal, "there is no right to appeal from an interlocutory order." *Darroch v. Lea*, 150 N.C. App. 156, 158, 563 S.E.2d 219, 221 (2002) (citation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (citation and quotation marks omitted). While an interlocutory appeal may be allowed in "exceptional cases," this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its "burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature." *Id.* at 77, 711 S.E.2d at 188-89 (citation omitted).

There are two instances in which an interlocutory appeal may be allowed:

> First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted

> to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal citations and quotation marks omitted). In the instant case, Hunt argues that this appeal from the order compelling arbitration is proper because it affects a substantial right. We disagree.

This Court has held that an order compelling arbitration affects no substantial right that would warrant immediate appellate review under N.C. Gen. Stat. § 1-277. *See N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 127-29, 381 S.E.2d 896, 898-99, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 461 (1989); *The Bluffs v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984). Although Hunt argues that its appeal concerns the scope of the trial court's order, rather than merely the grant of the order, this minor difference in degree does not affect our review of an order compelling arbitration.

"A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted). No substantial rights are affected by an order compelling arbitration because the parties have not been barred access to the courts. *Darroch*, 150 N.C. App. at 162, 563 S.E.2d at 223 (citation omitted). The applicable statutory scheme, our Revised Uniform Arbitration Act (the "Act"), N.C. Gen. Stat. § 1-569.1 to .31 (2015), provides in Subsections .23 and .24 procedures by which a party to an arbitration may move the trial court to vacate, modify, or correct an arbitration award. One such ground for vacating an arbitration award is that there was no agreement to arbitrate. N.C.G.S. § 1-569.23(5) (2015). Accordingly, Plaintiff can obtain judicial review of the award resulting from arbitrating this matter.

Furthermore, Subsection .28 of the Act provides an enumerated list of the grounds from which an appeal may be taken:

> (a) An appeal may be taken from:
>
> (1) An order denying a motion to compel arbitration;
>
> (2) An order granting a motion to stay arbitration;
>
> (3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A final judgment entered pursuant to this Article.

N.C.G.S. § 1-569.28 (2015). In analyzing the relevant portions of this Act, this Court has noted the six situations listed above and the "conspicuous absence from the list of an appeal from an order compelling arbitration. Such an order, [we have] held, is interlocutory and not immediately appealable." *N.C. Electric Membership Corp.*, 95 N.C. App. at 127, 381 S.E.2d at 899 (citing *The Bluffs*, 68 N.C. App. at 285, 314 S.E.2d at 293).

"To [further] aid in statutory construction, the doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others." *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (citations omitted). Under this doctrine, by specifically enumerating the permissible grounds for appeal, we can infer that the Legislature purposely excluded any other grounds for appeal not included in the statutory text. *See Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 141, 757 S.E.2d 302, 307 (2014). Accordingly, under Subsection .28, there is no right to interlocutory review of an order compelling arbitration. *Laws v. Horizon Housing, Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (citation omitted).

Hunt is unable to demonstrate that the order compelling arbitration affects a substantial right because Hunt is not barred from seeking relief from the trial court, and ultimately from petitioning this Court following arbitration. Additionally, under Subsection .28 of the Act, an order compelling arbitration is not an enumerated ground for appellate review of arbitration orders. For these reasons, we are unable to reach the merits of this appeal for lack of subject-matter jurisdiction.

Conclusion

Because an order compelling arbitration is interlocutory, and neither affects a substantial right that would be lost without our review, nor falls within the enumerated grant of appellate review of N.C. Gen. Stat. § 1-569.28, this appeal must be dismissed for lack of subject-matter jurisdiction.

DISMISSED.

Judge ELMORE concurs.

Judge INMAN concurs with separate opinion.

INMAN, Judge, concurring.

I concur with the majority's decision dismissing this interlocutory appeal. I write separately to note that I do not construe N.C. Gen. Stat. § 1-569.28 or longstanding precedent to prohibit *per se* all interlocutory appeals from orders compelling arbitration.

Section 1-277(a) of the North Carolina General Statutes provides that

> [a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2015). Although this Court and the North Carolina Supreme Court have consistently held that orders compelling arbitration do not fall within the criteria of Section 1-277(a), if an appellant asserts that an order compelling arbitration affects a substantial right, some consideration of the nature of the case at issue is necessary before rejecting the argument.

The majority's analysis regarding why appellant here has not shown that the order compelling arbitration affects a substantial right is sound but, in my view, incomplete. I would hold that in addition to the generic reasons that an order to compel arbitration generally does not affect a substantial right, appellant here has not demonstrated any factual or procedural characteristic of this case that distinguishes it from other appeals from orders compelling arbitration that have been held not to affect a substantial right. *See*, *e.g.*, *N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 128-29, 381, S.E.2d 896, 898-99 (1989)(holding that an order compelling arbitration did not affect a substantial right, based on analysis addressing specific contractual provisions disputed by the parties).

The majority's interpretation of our statutes and precedent as prohibiting an appeal from *any* order compelling arbitration provides a simple, bright line rule at the expense of an appeal of right in the rare

case which meets Section 1-277's substantial right criteria. This expense may be more theoretical than practical, because an appellant who cannot establish a right to appeal can petition for certiorari review. *See State v. Phillip Morris USA, Inc.*, 193 N.C. App. 1, 6, 666 S.E.2d 783, 787 (2008)(holding based on the contract in dispute that the appellant had not shown an order compelling arbitration affected a substantial right, but granting a petition for a writ of certiorari to review the interlocutory order). Nevertheless, I see no need to completely foreclose all such appeals where facts may arise in which a substantial right is affected.

PAUL FRAMPTON, PETITIONER-PLAINTIFF
v.
THE UNIVERSITY OF NORTH CAROLINA AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT-DEFENDANTS

No. COA16-1236

Filed 15 August 2017

1. Attorney Fees—termination of tenured professor—substantial justification

The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where defendant university acted with substantial justification in managing an unusual set of circumstances.

2. Attorney Fees—termination of tenured professor—special circumstances

The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where it would be unjust to require the State to pay attorney fees under such special circumstances based on defendant university's responsibility to manage public funds and plaintiff professor's own choices that precipitated this dispute.

Appeal by plaintiff from orders entered 28 June and 3 August 2016 by Judge James E. Hardin, Jr., in Orange County Superior Court. Heard in the Court of Appeals 2 May 2017.

Law Office of Barry Nakell, by Barry Nakell, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for defendant-appellee.

BRYANT, Judge.

Where the plain language of a statute permits the trial court to exercise its discretion in the award of attorney's fees and where plaintiff does not establish an abuse of discretion in the court's denial of plaintiff's motion for attorney's fees, we affirm.

The background of this case is set out in *Frampton v. Univ. of N.C.* (*Frampton I*), 241 N.C. App. 401, 773 S.E.2d 526 (2015). In brief, the case addressed the termination of Paul Frampton ("plaintiff"), a tenured professor at the University of North Carolina at Chapel Hill ("UNC"), who was arrested in an airport in Buenos Aires, Argentina and ultimately convicted of smuggling cocaine found in his suitcase. *Id.* Following plaintiff's arrest, UNC's chancellor placed plaintiff on unpaid leave and terminated his salary and benefits without pursuing the disciplinary procedures outlined in the university's tenure policies. After appealing to the UNC Board of Trustees, which upheld the decision to place plaintiff on leave without pay, plaintiff filed a petition for judicial review of a State agency decision in Orange County Superior Court. The superior court affirmed UNC's actions, and plaintiff appealed to this Court. On appeal, this Court held that by placing plaintiff on personal, unpaid leave instead of pursuing formal disciplinary proceedings pursuant to the tenure policy, UNC violated its own policies. On this basis, this Court reversed the trial court's ruling and remanded the matter for the trial court to determine the appropriate amount of the salary and benefits withheld that should have been paid to plaintiff. *Id.* at 414, 773 S.E.2d at 535.

Upon remand, plaintiff filed a motion requesting compensation for unpaid salary and benefits as well as attorney's fees. The trial court awarded plaintiff $231,475.92 in back salary and $31,824.53 for loss of benefits, but denied the motion for attorney's fees. The trial court found "UNC-Chapel Hill did not act without substantial justification as it attempted to manage an unusual set of circumstances that were not of its own making, and that it would be unjust to require the State to pay

attorney fees under such special circumstances." Plaintiff now appeals the trial court's denial of his request for attorney's fees to this Court.[1]

On appeal, plaintiff argues the trial court abused its discretion by denying his motion for an award of attorney's fees, made pursuant to our General Statutes, section 6-19.1, contending the trial court improperly concluded UNC (I) acted with substantial justification (2) under special circumstances that would make the award unjust. We disagree.

The standard of review for a trial court's decision whether to award attorney's fees is abuse of discretion. *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 234 N.C. App. 336, 760 S.E.2d 750 (2014). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Smith v. Beaufort Cty. Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citation omitted). On appeal, the appellant has the burden to show the trial court's ruling was unsupported by reason or could not be the product of a reasoned decision. *High Rock Lake Partners, LLC*, 234 N.C. App. at 340, 760 S.E.2d at 753.

As the appellant, here, plaintiff contends the trial court abused its discretion by finding "UNC-Chapel Hill did not act without substantial justification" under special circumstances and that it would be unjust to require UNC to pay plaintiff's attorney's fees.

General Statutes, section 6-19.1, specifically addresses the awarding of attorney's fees to parties defending against agency decisions.

> In any civil action . . . brought by a party who is contesting State action . . . the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case . . . if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

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1. On 30 March 2016, pursuant to the decision of this Court in *Frampton I*, plaintiff filed a motion seeking attorney's fees. Following the trial court's denial of the motion on 28 June 2016, plaintiff filed a motion for reconsideration of the ruling pursuant to Rules 59 and 60. In an order entered 3 August 2016, the trial court denied the motion for reconsideration. Plaintiff appeals both orders.

> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1(a) (2015). In accordance with this statute, our Supreme Court determined that in order for a trial court to act within its discretion and award attorney's fees to the prevailing party, the trial court must first find that the State agency acted "without substantial justification" and, second, that there were no special circumstances which would make awarding attorney's fees unjust. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 843, 467 S.E.2d 675, 678 (1996). Thus, a trial court's power to award attorney's fees manifests only when the court determines that the agency acted without substantial justification and no special circumstances exist. *High Rock Lake Partners, LLC*, 234 N.C. App. at 339, 760 S.E.2d at 753. However, even when both criteria are met, the trial court is not *required* to award attorney's fees. *See id.* at 339, 760 S.E.2d at 753.

I. Substantial Justification

[1] Plaintiff first argues that the trial court erred in concluding UNC did not act without substantial justification. We disagree.

A state agency has the initial burden before the trial court to show substantial justification existed. *Early v. Cty. of Durham, Dep't. of Soc. Servs.*, 193 N.C. App. 334, 347, 667 S.E.2d 512, 522 (2008). The "substantial justification" standard requires that a State agency bear the burden "to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Crowell Constructors*, 342 N.C. at 844, 467 S.E.2d at 679. On appeal, a trial court's determination that a state agency's actions were substantially justified is a reviewable conclusion of law, but findings of fact are binding if substantiated by evidence in the record. *See Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232–33 (1993); *see also Early*, 193 N.C. App. at 346–47, 667 S.E.2d at 522. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." (citation omitted)).

This Court has made it clear that an agency need not be "legally correct in order to avoid liability for attorney's fees." *Estate of Joyner v. N.C. Dep't of Health & Human Servs.*, 214 N.C. App. 278, 292, 715 S.E.2d 498, 508 (2011).

> The test for substantial justification is not whether this Court ultimately upheld respondent's reasons . . . but, rather, whether respondent's . . . [actions were] justified to a degree that could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent . . . [acted].

S.E.T.A. UNC-CH, Inc. v. Huffines, 107 N.C. App. 440, 443–44, 420 S.E.2d 674, 676 (1992) (citation omitted).

Here on appeal, UNC argues that the trial court's finding, "UNC-Chapel Hill did not act without substantial justification" by deciding to place plaintiff on unpaid, personal leave instead of pursuing disciplinary action as outlined by UNC's tenure policies, was supported by the evidence before the trial court.

In *Frampton I*, this Court emphasized that the disciplinary procedures incorporated by UNC's own policies provided a method of recourse in the event a tenured professor was unable to perform the professional duties required, such as in plaintiff's case. 241 N.C. App. at 413, 773 S.E.2d at 534.

> While we can envision scenarios in which it would be more beneficial to place a tenured faculty member on unpaid personal leave without his or her consent in order to protect the faculty member's reputation from the stigma associated with disciplinary actions—even if those proceedings result in a favorable outcome—we believe that the *more reasoned* interpretation of the unpaid leave policy could only support its application if the faculty member either requested it or consented to it. Moreover, the fact that there is no "mandated" appeal procedure for this type of leave suggests that . . . the unpaid personal leave policy is not intended to be unilaterally imposed upon a tenured professor given the procedural protections afforded to faculty members in all other situations.

Id. (emphasis added). However, while our Court in *Frampton I* determined that UNC's actions were not proper in light of its own tenure policies, the determination of whether the actions were based on substantial justification is reviewed for the first time in this appeal (*Frampton II*).

In *Daily Express, Inc. v. Beatty*, after a trial court determined an agency's position was not legally correct, it awarded attorney fees to the plaintiff. 202 N.C. App. 441, 688 S.E.2d 791 (2010). On appeal, this Court reversed the attorney fee award to the plaintiff after making a distinction between whether the agency's actions were legally correct and whether the agency's actions were substantially justified. *Id.* at 455–56, 688 S.E.2d at 802. "[E]ven though we ultimately did not accept [the agency's] construction of the applicable statutory provisions, we recognized that [the agency's] construction of the relevant statutory language had some level of support in both logic and the language enacted by the General Assembly." *Id.* at 455, 688 S.E.2d at 802. Therefore, this Court in *Daily Express* held that the agency was not liable to plaintiff for attorney's fees under N.C. Gen. Stat. § 6-19.1, because although the agency's actions were later determined to be erroneous, "at the time that action was taken, [the agency was] not without substantial justification[.]" *Id.* at 456, 688 S.E.2d at 802.

Thus, as our Court reasoned in *Daily Express* (notwithstanding an erroneous decision, a court must consider the existence of substantial justification), the Orange County Superior Court reasoned that "UNC-Chapel Hill did not act without substantial justification." We uphold the trial court's determination, and therefore, the court's order has met the substantial justification prong of section 6-19.1.

II. Special Circumstances

[2] Plaintiff next argues the trial court erred in finding that there were special circumstances that would make an award of attorney's fees unjust. We disagree.

North Carolina case law is limited with regard to interpreting what qualifies as special circumstances that would make an award of attorney's fees unjust. However, our courts have looked to federal decisions applying similar laws for guidance on interpreting statutory language. *See generally Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 618 S.E.2d 201 (2005). Specifically, our Supreme Court, when interpreting N.C. Gen. Stat. § 6-19.1, has incorporated the United States Supreme Court's interpretation of the federal Equal Access to Justice Act ("EAJA") which "contains an attorney's fees provision almost identical to [N.C. Gen. Stat. § 6-19.1]." *See Crowell*, 342 N.C. at 843, 467 S.E.2d at 679 (showing the identical language of the substantial justification and special circumstances prongs and citing United States Supreme Court decisions to interpret the language of the federal statute that is identical to that of the North Carolina statute).

Interpreting "special circumstances" in the EAJA as a "safety valve" preventing unjust awards, the United States Supreme Court stated the special circumstances provisions allow "the [trial] court[s] discretion to deny awards where equitable considerations dictate an award should not be made." *Scarborough v. Principi*, 541 U.S. 401, 423, 158 L. Ed. 2d 674, 692 (2004) (citation omitted).

Though not giving deference to UNC's basis for withholding benefits in *Frampton I*, this Court did acknowledge the uniqueness of the situation UNC faced. 241 N.C. App. at 412, 773 S.E.2d at 534. "This case requires this Court, as it required the trial court and the University, to resolve an unusual and controversial dispute that tests the University's responsibilities as an employer of tenured faculty and as a steward of public funds." *Id.* at 401–02, 773 S.E.2d at 527. In reviewing the issues that are currently before this Court, we hold that based on UNC's responsibility to manage public funds and plaintiff's own choices that precipitated this dispute, the trial court acted within its discretion in determining special circumstances would make an award of attorney's fees unjust in this case, thus satisfying the second prong of section 6-19.1.

Regardless, even if UNC acted without substantial justification and no special circumstances existed, the controlling statute specifically states that a trial court "may" use its discretion to decide whether to grant or deny an award of attorney's fees. N.C. Gen. Stat. § 6-19.1(a). It is not *required* to award attorney's fees. *See High Rock Lake Partners, LLC*, 234 N.C. App. at 339, 760 S.E.2d at 753 (setting out the standard of review for a trial court's decision on whether or not to award attorney's fees as abuse of discretion). Plaintiff relies on what he contends was the trial court's error in finding substantial justification for UNC's action to support the conclusion that the trial court was "operating under a mistake of law" and "abused its discretion in denying the motion for an award of attorney's fees." However, on appeal, plaintiff asserts "the trial court erred on both points, 'rational basis' and 'special circumstance,' so there can be no 'reason' supporting its decision to deny the motion." By this assertion, plaintiff improperly implies that a failure to prove both provisions—substantial justification and special circumstances—mandates that the trial court award attorney's fees. Yet, the plain language of the statute merely permits the trial court to decide whether to grant the award of attorney's fees; the use of "may" does not necessitate an action by the trial court when both prongs are satisfied.

In the order denying plaintiff attorney's fees, the trial court based its conclusion that "it would be unjust to require the State to pay attorney's fees" to plaintiff on "the record in this case, the decision of the North

Carolina Court of Appeals [in *Frampton I*], the submissions of the parties, the arguments of counsel, and the relevant-statutory and case law." Given the trial court's reasoned response and plaintiff's failure to establish that the trial court abused its discretion in reaching its decision to deny the requested award, we overrule plaintiff's argument.

Therefore, the orders entered 28 June 2016 and 3 August 2016 denying appellant's request for attorney's fees, are

AFFIRMED.

Judges STROUD and DAVIS concur.

RICHARD HOWSE AND MARY B. REED, PLAINTIFFS
v.
BANK OF AMERICA, N.A. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, DEFENDANTS

No. COA16-979

Filed 15 August 2017

1. Declaratory Judgments—foreclosure by power of sale—collateral attack—North Carolina Uniform Declaratory Judgments Act—equitable action

The trial court erred in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by determining that the entirety of plaintiffs' complaint was a collateral attack on a valid judgment. While plaintiffs' claims under the North Carolina Uniform Declaratory Judgments Act in N.C.G.S. § 1-253 et seq. were an impermissible collateral attack, plaintiffs' complaint was sufficient to invoke equitable jurisdiction pursuant to N.C.G.S. § 45-21.36 to argue equitable grounds to enjoin the foreclosure sale. On remand, the trial court was instructed to ensure that the rights of the parties have not become fixed before proceeding with an equitable action pursuant to N.C.G.S. § 45-21.34.

2. Declaratory Judgments—foreclosure by power of sale—denial of motion to compel discovery—abuse of discretion—equitable claims

The trial court abused its discretion in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by denying plaintiffs' motion to compel discovery.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 5 May 2016 by Judge Gregory R. Hayes in Superior Court, Catawba County. Heard in the Court of Appeals 6 March 2017.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for Plaintiffs-Appellants.

McGuire Woods, LLP, by Nathan J. Taylor, for Defendants-Appellees.

McGEE, Chief Judge.

Richard Howse and Mary B. Reed ("Plaintiffs") appeal from the trial court's 5 May 2016 order granting Bank of America, N.A.'s ("Bank of America") and Federal National Mortgage Association's ("Fannie Mae") (collectively, "Defendants") motion for summary judgment, and denying Plaintiffs' motion to compel. We affirm in part, reverse and remand in part.

I. Background

Plaintiffs executed a promissory note ("the Note") in the principal amount of $376,000.00, made payable to Bank of America, on 16 July 2008. The Note was secured by a deed of trust (the "Deed of Trust") executed by Plaintiffs on 16 July 2008 on real property located at 6965 Navahjo [sic] Trail, Sherrills Ford, North Carolina 28673 ("the Property"). Bank of America was named as the lender in the Deed of Trust. The terms of the Deed of Trust allowed "[t]he Note or a partial interest in the Note . . . [to] be sold one or more times without prior notice to [Plaintiffs]." The Deed of Trust also provided that Plaintiffs would be given written notice of a change in loan servicer.

Bank of America sold the Note to Fannie Mae on 1 August 2008, but Bank of America remained the loan servicer. Bank of America remained the loan servicer throughout the life of the loan. Bank of America "was authorized by Fannie Mae to make determinations with respect [to] borrower eligibility for loan modification programs offered by Fannie Mae."

Plaintiffs defaulted on the Note in November 2009. After defaulting, Plaintiffs contacted Bank of America on several occasions regarding the Note. Plaintiffs delivered a letter of hardship, along with certain financial statements, to Bank of America on or about 8 April 2010. On or about 28 June 2010, Plaintiffs told Bank of America that the Property was a vacation rental property and, therefore, the Property was not eligible for

Fannie Mae's "Making Home Affordable" Program. Plaintiffs again sent correspondence to Bank of America inquiring about the Note and Deed of Trust on 12 March 2012. Bank of America notified Plaintiffs by letter on 4 June 2012 that "[t]he current owner of the [N]ote is [Fannie Mae]."[1]

On 8 August 2012, Bank of America commenced a foreclosure by power of sale proceeding by filing a notice of hearing before the Clerk of Superior Court for Catawba County ("the Clerk"). The Clerk entered an order on 8 November 2012 finding that "the [Note] is now in default and the instrument securing said debt gives the note holder the right to foreclose under a power of sale." The order further provided that a foreclosure sale could proceed on the Deed of Trust (the "Order for Sale"). Plaintiffs appealed the Order for Sale to the superior court on 11 November 2012.

While Plaintiffs' appeal to the superior court was pending, Bank of America repurchased the Note from Fannie Mae on 7 January 2013. After repurchasing the Note, Bank of America sent Plaintiffs a letter on 22 March 2013 to determine whether Plaintiffs qualified for a loan modification. Bank of America did not receive a response from Plaintiffs.

The superior court entered an order on 12 June 2013 affirming the Order for Sale entered by the Clerk. In the orders of the Clerk and the trial court, Bank of America was found to be the holder of the Note. Plaintiffs appealed the trial court's order affirming the Clerk's Order for Sale to this Court, and we affirmed the trial court's order in an opinion entered 15 April 2014. *See In re Foreclosure of a Deed of Trust Executed by Reed*, 233 N.C. App. 598, 758 S.E.2d 902, 2014 N.C. App. LEXIS 381 (2014) (unpublished) (hereinafter "*Foreclosure of Reed*"). This Court held that

> the [Deed of Trust] contains a description of the land sufficient to identify the subject property. Further, the record contains competent evidence for us to conclude that [Bank of America] was the current holder of a valid debt. Accordingly, the trial court did not err in ordering [Bank of America] to proceed with the foreclosure pursuant to N.C. Gen. Stat. § 45-21.16[.]

Id. at *10.

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1. Some facts described herein originate from Plaintiffs' complaint. Because this case is before this Court on an appeal from the trial court's grant of summary judgment in favor of Defendants, we consider all facts in the light most favorable to Plaintiffs, the nonmoving parties. *See Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 202, 377 S.E.2d 285, 287 (1989).

Subsequent to this Court's decision in *Foreclosure of Reed*, Plaintiffs initiated the present lawsuit by filing a complaint for declaratory judgment and other relief on 16 March 2015. In their complaint, Plaintiffs alleged, *inter alia*, that Defendants breached the covenants of good faith and fair dealing by their "conduct of concealment and misrepresentation[,]" and by their negligent misrepresentation of material facts that Plaintiffs relied upon to their detriment. Plaintiffs requested a declaratory judgment that North Carolina's foreclosure by power of sale statute, N.C. Gen. Stat. § 45-21.16(d), was unconstitutional as applied to them. Plaintiffs requested an accounting "of all funds to be applied to the Note;" and requested "declaratory relief . . . pursuant to . . . the Uniform Declaratory Judgments Act[, N.C. Gen. Stat. § 1-253 *et seq*,] for the declaration that none of the Defendants have any legal or equitable rights in the Note or Deed of Trust, including for purposes of foreclosure[.]" The complaint requested the court, "[p]ursuant to N.C.G.S. § 45-21.34 and § 1-485," issue "a preliminary injunction barring any sale, conveyance, or foreclosure of the Property pending the full disposition of" Plaintiffs' lawsuit.

Defendants filed a motion to dismiss Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 12 June 2015. The trial court denied Defendants' motion by order entered 11 August 2015. Defendants served their answer and affirmative defenses to Plaintiffs' complaint on 28 August 2015. While the discovery process was ongoing, Defendants filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 on 1 April 2016. Plaintiffs filed a motion to compel on 18 April 2016, arguing that Defendants had failed to answer interrogatories and produce documents requested in the discovery process.

A hearing was held on 2 May 2016 on Defendants' motion for summary judgment and Plaintiffs' motion to compel. Plaintiffs argued they were unable to procure evidence in support of their claims due to Defendants' failure to answer their discovery requests. Following the hearing, the trial court held that Plaintiffs' complaint "contain[ed] a collateral attack on a valid judgment; that there [was] no genuine issue of material fact and that Defendants [were] entitled to judgment as a matter of law." Accordingly, the trial court granted Defendants' motion for summary judgment and denied Plaintiffs' motion to compel. Plaintiffs appeal.

II. Analysis

The central question on appeal concerns whether the present lawsuit is, as the trial court found, a "collateral attack" on the foreclosure by power of sale proceeding this Court upheld as valid in *Foreclosure of*

Reed. In addition to arguing that the present lawsuit is not a collateral attack and the trial court erred in so finding, Plaintiffs also argue the trial court erred in granting Defendants' motion for summary judgment while Plaintiffs' motion to compel discovery was still pending.

A. Collateral Attack on a Valid Judgment; N.C. Gen. Stat. § 45-21.34

[1] Plaintiffs argue the trial court erred in granting summary judgment to Defendants on the grounds that their lawsuit was an impermissible collateral attack on an otherwise valid judgment. Summary judgment has been described by this Court as a "drastic remedy," the purpose of which is to "save time and money for litigants in those instances where there is no dispute as to any material fact." *Leake*, 93 N.C. App. at 201, 377 S.E.2d at 286 (citing *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975)). On appeal, "we review summary judgments to determine if there was a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *MacFadden v. Louf*, 182 N.C. App. 745, 746, 643 S.E.2d 432, 433 (2007). The standard of review for summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

A collateral attack "is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (quotation marks and citation omitted); *see also Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) ("A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." (internal quotation marks omitted)).

We find the present lawsuit, to the extent that Plaintiffs seek relief pursuant to the North Carolina Uniform Declaratory Judgments Act, N.C. Gen. Stat. § 1-253 *et seq* ("UDJA"), to be an impermissible collateral attack. In the foreclosure by power of sale proceeding, the Clerk "entered an order authorizing [Bank of America] to foreclose on [the Property] pursuant to N.C. Gen. Stat. § 45-21.16." *Foreclosure of Reed*, 2014 N.C. App. LEXIS 381, at *2. Plaintiffs appealed to the trial court and, after the trial court denied Plaintiffs' appeal, this Court held "the trial court did not err in ordering [Bank of America] to proceed with the foreclosure pursuant to N.C. Gen. Stat. § 45-21.16[.]" *Id.* at *10.

The UDJA is a statutory scheme wholly separate from the statutory procedure for foreclosure by power of sale provided by N.C.G.S. § 45-21.16 *et seq*, and any relief potentially available under the UDJA

would require the "judgment in another action" – the foreclosure by power of sale action in this matter in which this Court held that the trial court did not err in ordering Bank of America to proceed with the foreclosure – to be "adjudicated invalid." *Thrasher*, 4 N.C. App. at 540, 167 S.E.2d at 553. Therefore, any relief pursuant to the UDJA would constitute an impermissible collateral attack. This conclusion, however, does not end our analysis. While Plaintiffs' complaint in the present case primarily sought relief under the UDJA, Plaintiffs also sought relief pursuant to N.C.G.S. § 45-21.34. As explained below, we find that the trial court erred in granting Defendants' motion for summary judgment on Plaintiffs' equitable claims made pursuant to N.C.G.S. § 45-21.34.

"There are two methods of foreclosure possible in North Carolina: foreclosure by action and foreclosure by power of sale." *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985) (citation omitted). In foreclosure by power of sale proceedings, such as the one undertaken by Defendants on the Property which was the subject of our decision in *Foreclosure of Reed*, the clerk of superior court "is limited to making the six findings of fact specified" in N.C.G.S. § 45-21.16(d):

> (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee's right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice under [N.C. Gen. Stat. § 45-102] and the lapse of the periods of time established by Article 11, if the debt is a home loan as defined under [N.C. Gen. Stat. § 45-101(1b)]; and (6) the sale is not barred by [N.C. Gen. Stat. § 45-21.12A].

In re Young, 227 N.C. App. 502, 505-06, 744 S.E.2d 476, 479 (2013) (citations and quotation marks omitted). While the clerk's findings of fact "are appealable to the superior court for a hearing *de novo*," the superior court's authority in reviewing the clerk's findings "is similarly limited to determining whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied." *Id.* In a *de novo* appeal to the superior court in a N.C.G.S. § 45-21.16 foreclosure by power of sale proceeding, "the trial court must decline to address any party's argument for equitable relief, as such an action would exceed the superior court's permissible scope of review." *Id.* (citations, brackets and quotation marks omitted); *see also In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993) ("Equitable defenses to foreclosure . . .

may not be raised in a hearing pursuant to [N.C.G.S.] § 45-21.16 or on appeal therefrom[.]").

While equitable defenses to foreclosure are not available in a N.C.G.S. § 45-21.16 proceeding, "equitable defenses to foreclosure may be raised in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed." *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 423, 775 S.E.2d 1, 6 (2015). "The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to [N.C.]G.S. [§] 45-21.34." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). N.C.G.S. § 45-21.34 provides, in relevant part,

> Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A *to enjoin such sale, upon . . . any . . . legal or equitable ground which the court may deem sufficient*: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction.

N.C. Gen. Stat. § 45-21.34 (2015) (emphasis added).

In the present case, Defendants sought foreclosure on the Property through foreclosure by power of sale. The Clerk found the six prerequisites required for foreclosure as specified in N.C.G.S. § 45-21.16 to be present, and ordered that the foreclosure proceed. The Clerk's findings were upheld both on appeal to the superior court and this Court. *Foreclosure of Reed*, 2014 N.C. App. LEXIS 381, at *2-3. However, none of those proceedings – before the Clerk, the superior court, or this Court – dealt with any equitable defenses to foreclosure. This was not through any failure of Plaintiffs, but rather was by design: Plaintiffs were barred

by our precedents from raising equitable defenses to foreclosure in the context of a N.C.G.S. § 45-21.16 foreclosure by power of sale proceeding. *E.g. In re Young*, 227 N.C. App. at 505-06, 744 S.E.2d at 479 ("the trial court must decline to address any party's argument for equitable relief, as such an action would exceed the superior court's permissible scope of review." (citations, brackets and quotation marks omitted)).

It is clear that equitable defenses to foreclosure may only be considered through a proceeding pursuant to N.C.G.S. § 45-21.34. Such an action is not a collateral proceeding attacking a valid judgment, but is rather a statutorily-created method by which "[a]ny owner of real estate, or other person, firm or corporation having a legal or equitable interest therein" may present equitable defenses to foreclosure when the foreclosure proceeding does not otherwise contain a mechanism for those defenses to be considered.

In addition to presenting claims under the UDJA, Plaintiffs' complaint in the present case requested injunctive relief "[p]ursuant to N.C.G.S. § 45-21.34," and asked the trial court to "issue a preliminary injunction barring any sale, conveyance, or foreclosure of the Property pending the full disposition of" the present lawsuit. We hold that Plaintiffs' invocation of N.C.G.S. § 45-21.34 was an "appl[ication] to a judge of the superior court" and was sufficient to raise Plaintiffs' equitable claims as to why the trial court should "enjoin such [foreclosure] sale." N.C.G.S. § 45-21.34. Therefore, Plaintiffs' equitable claims were proper under N.C.G.S. § 45-21.34, and the trial court erred in granting summary judgment to Defendants as to those claims.

As this Court has held, an equitable action pursuant to N.C.G.S. § 45-21.34 must be commenced "prior to the time the rights of the parties become fixed." *Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 6. In the present case, it appears Plaintiffs filed the present lawsuit after this Court issued its decision in *Foreclosure of Reed*, but before a foreclosure sale had occurred, as Plaintiffs' complaint requested the trial court enjoin any sale of the Property during the pendency of the present lawsuit. The rights of parties in a foreclosure by power of sale proceeding become fixed if an upset bid "is not filed following a sale, resale, or prior upset bid" within ten days. *See* N.C. Gen. Stat. §§ 45-21.27; 45-21.29A (2015). On the record before us, it appears that the Property has not been sold in a foreclosure sale and, thus, the rights of the parties have not become fixed. On remand, the trial court should ensure that the rights of the parties have not become fixed before proceeding with an equitable action pursuant to N.C.G.S. § 45-21.34.

B. Motion to Compel

[2] Plaintiffs also argue the trial court erred by granting summary judgment while discovery was not yet completed and while Plaintiffs' motion to compel was still pending. "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

As our Supreme Court has held, "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). This general rule is not absolute, and this Court has upheld awards of summary judgment when a motion to compel was pending where, for instance, summary judgment was properly granted on sovereign immunity grounds. *See Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 597-98, 655 S.E.2d 920, 924 (2008); *see also N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995) ("A trial court is not barred in every case from granting summary judgment before discovery is completed." (citations omitted)).

In the present case, though, it appears from the face of the trial court's order that it denied Plaintiffs' motion to compel *because* it had determined that Defendants' motion for summary judgment should be granted on the theory that Plaintiffs' entire lawsuit was an impermissible collateral attack. The trial court's order stated that "after considering the submissions and arguments of the parties," it determined that Plaintiffs' complaint "contain[ed] a collateral attack on a valid judgment" and therefore ordered that "Defendants' [m]otion for [s]ummary [j]udgment [was] granted" and "further ordered" that "Plaintiff's [m]otion to [c]ompel [was] denied." (all caps omitted).

In light of our determination that the trial court erred in granting Defendants' motion for summary judgment as to Plaintiffs' claims pursuant to N.C.G.S. § 45-21.34, and the fact that no other reason for the trial court's denial of Plaintiffs' motion to compel discovery appears on the face of the order, we find the trial court abused its discretion in denying Plaintiffs' motion to compel.

The dissent cites the well-settled principle of North Carolina law which states that a trial court's ruling on a motion for summary judgment should be upheld upon "any theory of law" and should not be set aside "merely because the court gave a wrong or insufficient reason for it." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (citation omitted). The dissent then discusses Plaintiffs' claims for relief and how, in the dissent's view, those claims cannot be sustained.

The dissent's analysis is surely thoughtful, and may – on remand and after consideration of Plaintiffs' motion to compel – be found to be meritorious. But it is clear reviewing the transcript of the hearing that the trial court believed Plaintiffs' entire lawsuit to be a collateral attack, which obviated the need for it to consider whether information useful to Plaintiffs' claims could be had with more discovery. When giving its oral ruling on Defendants' motion for summary judgement, the trial court stated that "having reviewed the file and having heard the argument of the attorneys, . . . I think [Plaintiffs' lawsuit is] a collateral attack on the foreclosure and therefore I'm going to grant the Defendants' Motion for Summary Judgment and deny Plaintiffs' Motion to Compel." As noted, this Court has previously stated that "[o]rdinarily it is error" for a trial court to rule on a motion for summary judgment "when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending." *Evans v. Appert*, 91 N.C. App. 362, 367, 372 S.E.2d 94, 97 (1988).

Once a party moving for summary judgment has shown that "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law," the burden then "shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 138 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) (citations omitted).[2] In the present case, Plaintiffs had no opportunity to make that showing, as discovery had not been completed and the trial court did not allow Plaintiffs to "produce a forecast of evidence

2. Prior to moving for summary judgment, Defendants moved to dismiss Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), contending the complaint "fail[ed] to allege any facts supporting a claim for relief" and that the complaint "[was] barred by the doctrines of collateral estoppel and res judicata and the statute of limitations." After a hearing, the trial court denied Defendants' motion, and Defendants did not appeal that ruling to this Court.

. . . showing that he can at least establish a *prima facie* case at trial." *Id.* Once the trial court determined that Plaintiffs' lawsuit was a collateral attack, that was the end of the trial court's inquiry.

In their motion to compel, Plaintiffs requested Defendants be compelled to produce documents, supplements to interrogatories, and other information that Defendants had not yet produced in the discovery process. Even if Plaintiffs had been given the opportunity to produce "a forecast of evidence" showing a *prima facie* case on each of their claims for relief, their ability to make such a showing would have been hindered by the incomplete discovery process and the lack of a merits ruling on their motion to compel. Therefore, the appropriate disposition in the present case is to reverse the grant of summary judgment and the denial of Plaintiffs' motion to compel to allow the trial court to determine whether information relevant to any of Plaintiff's claims could be exposed though the discovery sought in Plaintiffs' motion to compel.[3]

III. Conclusion

The trial court erred in determining that the entirety of Plaintiffs' complaint was a collateral attack on a valid judgment. While Plaintiffs' claims under the UDJA were an impermissible collateral attack, Plaintiffs' complaint was sufficient to invoke the trial court's equitable jurisdiction pursuant to N.C.G.S. § 45-21.36 to argue the equitable grounds upon which the foreclosure sale should be enjoined. On remand, the trial court must determine whether the rights of the parties have become fixed pursuant to N.C.G.S. §§ 45-21.27 and 45-21.29A and, if not, which of Plaintiffs' claims may proceed in a N.C.G.S. § 45-21.34 action. The trial court must then conduct further proceedings, as appropriate, on those equitable claims.

We also reverse the trial court's denial of Plaintiffs' motion to compel. Because the trial court erred in granting summary judgment to Defendants, the denial of Plaintiffs' motion to compel was also in error.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge DAVIS concurs.

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3. We note that the briefing to this Court from both Plaintiffs and Defendants focused *exclusively* on whether Plaintiffs' lawsuit was an impermissible collateral attack and whether the trial court erred in denying Plaintiffs' motion to compel. Neither party's brief addressed whether the trial court properly granted summary judgment to Defendants for any other reason, such as those discussed by the dissent.

Judge BERGER concurs in part and dissents in part by separate opinion.

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

I concur with the majority's opinion that Plaintiffs' claim is an impermissible collateral attack on the foreclosure order that was properly entered pursuant to N.C. Gen. Stat. § 45-21.16.

As to Plaintiffs' remaining claims, however, because Plaintiffs are unable to produce evidence supporting essential elements of their claims, I would affirm the trial court and respectfully dissent from the majority opinion.

Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The review of a trial court's grant of summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

A party moving for summary judgment may prevail by showing either: (1) "an essential element of the opposing party's claim is nonexistent, or (2) . . . the opposing party cannot produce evidence to support an essential element of his . . . claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). Once the moving party has met this burden, the opposing party must "set forth *specific facts* showing that there is a genuine issue for trial." *Id.* at 369-70, 289 S.E.2d at 366 (citation omitted) (emphasis in original). Where the opposing party is unable to demonstrate the existence of a material fact, a grant of summary judgment in favor of the movant is appropriate. *Id.* at 370, 289 S.E.2d at 366.

Evidence presented by the parties by way of discovery and affidavits established that in July 2008, Plaintiff Mary Reed obtained a loan in the amount of $376,000.00 payable to defendant Bank of America, N.A. ("BOA"). Said loan was secured by a Deed of Trust for property owned by both Plaintiffs located in Catawba County.

Plaintiffs did not use the property as their primary residence, but rather as income-producing vacation rental property. Despite having funds to do so, Plaintiffs failed to pay on the debt owed to BOA and

defaulted on the Note in November 2009. Plaintiffs admit that they failed to pay their monthly mortgage obligation to BOA, as shown in a letter from Plaintiffs to BOA dated April 7, 2010 in which they state:

> (1) "I am writing this letter to explain our unfortunate set of circumstances that have caused us to become delinquent in our mortgage."
>
> (2) "[W]e cannot afford to pay what is owed to you. It is our full intention to pay what we owe." (Emphasis in original).
>
> (3) "[W]e had purchased several homes with the intent of repairing/remodeling etc. and selling . . . [but] we were not able to afford nor spend the time to do that."
>
> (4) "We just got another home back that we had sold/financed when the person could not pay the monthly[.]"

Plaintiffs did not meet eligibility requirements for relief under Fannie Mae's Making Home Affordable program. Even so, BOA sent a letter to Plaintiffs in March 2013 seeking to assist Plaintiffs with modification of the loan. Plaintiffs never responded to BOA's inquiry.

In August 2012, foreclosure proceedings were initiated with the Catawba County Clerk of Court. An Order of Sale was entered by the Clerk which was eventually upheld by the trial court and this Court. Plaintiffs filed this action for equitable relief in Catawba County Superior Court in March 2015.

The Deed of Trust at issue contained typical language setting forth the responsibilities of both parties. Importantly, paragraph 20 specifically states:

> 20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest on the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and [a]pplicable [l]aw. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of

> the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA [Real Estate Settlement Procedures Act] requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

A review of the pleadings and discovery in this matter reveals that there is no genuine issue of material fact, and the trial court's entry of summary judgment should be affirmed.

Plaintiffs failed to perform under the Note. Plaintiffs' claims for relief concern allegations that Defendants "concealed . . . the true ownership of the Note" and misrepresented the identity of "the actual owner of the Note." Plaintiffs, however, pursuant to the terms of the Deed of Trust set forth above, forfeited notice for transfer of ownership of the Note unless there was a change to the Loan Servicer. The record in this case reflects BOA was the loan servicer throughout, and communications regarding Plaintiffs failure to perform under the Note were with BOA.

Although couched as equitable claims for relief, both of Plaintiffs' remaining claims stem from the legal obligations under the original Note and Deed of Trust. Plaintiffs' legal claims were resolved in the previous case, and as such, this was a collateral attack.

However, even if these are considered equitable claims, the trial court's entry of summary judgment should be affirmed. This Court previously held that, even if the court's decision was based on incorrect reasoning,

> a trial court's 'ruling must be upheld if it is correct upon any theory of law,' and thus it should 'not be set aside merely because the court gives a wrong or insufficient reason for it.' *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979). *See also Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958) (if correct result reached, judgment should not be disturbed even though [the] court may not have assigned the correct reasons for the judgment entered); *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408,

411 (1984) (it is common learning that a correct judgment must be upheld even if entered for the wrong reason).

Templeton v. Town of Boone, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (citation and brackets omitted). Accordingly, this Court may review a trial court's grant of summary judgment to determine if it is legally justifiable upon any theory of law. *See Id.* (citation omitted).

Negligent misrepresentation

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991) (citations omitted). In an ordinary debtor-creditor transaction, the lender's duty of care is defined by the loan agreement and does not extend beyond its terms. *Dallaire v. Bank of Am.*, N.A., 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014); *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) ("Here plaintiffs fail to allege any special circumstances that could establish a fiduciary relationship. Plaintiffs' allegations establish nothing more than a typical debtor-creditor relationship, wherein any duty would be created by contract through the loan agreement.").

In the present case, in regard to Defendants' contractually created duties under the loan agreement, the Deed of Trust expressly allows "[t]he Note or a partial interest in the Note . . . [to] be sold one or more times without prior notice to [Plaintiffs]." Furthermore, Plaintiffs fail to allege any special circumstances within the complaint which would establish a fiduciary relationship between the parties. Accordingly, Plaintiffs' relationship with Defendants is no more than the "typical debtor-creditor relationship," where Defendants' duties are controlled by the terms of the Deed of Trust. *See Arnesen*, 368 N.C. at 449, 781 S.E.2d at 8.

Pursuant to the express terms of the Deed of Trust, Plaintiffs forfeited notice of changes in ownership of the Note. Thus, because Defendants owed no duty to Plaintiffs regarding notice of ownership, contractually or otherwise, the negligent misrepresentation claim must fail because Plaintiffs cannot establish the elements necessary to create a genuine issue of material fact.

Even assuming, *arguendo*, that Defendants had a duty to inform Plaintiffs of changes in Note ownership, Plaintiffs' negligent

misrepresentation claim must fail because the argument that Defendants' alleged misrepresentations "thwarted" Plaintiffs' ability to determine "whether modifications were permitted by [the Note's owner]" has no merit.

The uncontroverted evidence shows that even during Fannie Mae's ownership of the Note, BOA, as loan servicer, "was authorized by Fannie Mae to make determinations with respect [to] borrower eligibility for loan modification programs offered by Fannie Mae." *See Royal v. Armstrong*, 136 N.C. App. 465, 473, 524 S.E.2d 600, 605 (uncontested evidence may be used during a motion for summary judgement to establish the nonexistence of an element necessary to sustain a claim), *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 495 (2000). Accordingly, BOA's alleged misrepresentations regarding the Note ownership would have no impact on Plaintiffs' eligibility for loan modification. Plaintiffs did not qualify because they were using the home as income producing rental property, not because of any actions on the part of Defendants.

Moreover, Plaintiffs' claim further fails because they cannot show detrimental reliance. Plaintiffs have acknowledged and conceded that they failed to make payments under the Note. There is no evidence, allegation, or assertion that Plaintiffs paid monies pursuant to the Note to any entity and failed to receive credit.

Breach of the implied covenant of good faith and fair dealing

Every contract in our State contains an implied covenant of good faith and fair dealing which works to prevent any party to a contract from doing anything to destroy or injure the right of the other party to receive the benefits of the contract. *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56-57, 607 S.E.2d 286, 291 (2005). Ordinarily, a party's claim for breach of the covenant of good faith and fair dealing is "part and parcel" of a claim for breach of contract. *See Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. rev. denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997); *see also Suntrust Bank v. Bryan/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (holding that where a party does not breach any of the terms of a contract, "it would be illogical for this Court to conclude that [the same party] somehow breached implied terms" of that contract (citation omitted)), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 180 (2012). However,

> North Carolina recognizes an [independent] action for breach of an implied duty of good faith and fair dealing in limited circumstances involving special relationships

> between parties, e.g., cases involving contracts for funeral services and insurance. Outside such circumstances, actions for breach of good faith fail. *See Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 466 S.E.2d 303 (1996) (no merit to claim of breach of duty of good faith involving retirement benefits); *Allman v. Charles*, 111 N.C. App. 673, 433 S.E.2d 3 (1993) (in a real estate sales contract, refusing to find an implied promise to make a good faith effort to sell); [*Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 610-11, 486 S.E.2d 443, 448] (no breach o[f] good faith in denial of tenure where university rationally followed its procedures); *Phillips v. J.P. Stevens & Co.*, 827 F. Supp. 349 (M.D.N.C. 1993) (no implied duty of good faith in employment contracts).

Mechanical Indus., Inc. v. O'Brien/Atkins Assocs., P.A., No. 1:97cv99, 1998 U.S. Dist. LEXIS 5389, at *11 (M.D.N.C. Feb. 4, 1998).

Here, as previously noted, Plaintiffs have failed to allege any special relationship with Defendants that would give rise to a duty beyond the "typical debtor-creditor relationship." *Arnesen*, 368 N.C. at 449, 781 S.E.2d at 8. Accordingly, because Plaintiffs legal claims were fully resolved in the prior foreclosure action, and because there is no special relationship between the parties, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing should be denied.

Motion to Compel

While it is ordinarily error for a trial court to rule on a summary judgment motion without addressing a pending motion to compel discovery, "the court is not barred in every case from granting summary judgment before discovery is completed." *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 112-13, 676 S.E.2d 594, 603 (2009) (citation and internal quotation marks omitted). For instance, "[a] trial court's granting [of] summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced." *Id.* at 113, 676 S.E.2d at 603 (citations omitted).

Here, Plaintiffs cannot demonstrate prejudice. As mentioned above, the relationship between the parties did not extend beyond the contractual duties ordinarily found between debtors and creditors. The information that may have been gathered through further discovery would not change the relationship between the parties, and Plaintiffs were not prejudiced.

The entry of summary judgment by the trial court dismissing Plaintiffs' equitable claims for (1) negligent misrepresentation, and (2)

breach of the implied covenant of good faith and fair dealing was proper because necessary elements of both claims could not be supported, and no genuine issue of material fact existed. Therefore, the trial court did not err by granting Defendants' motion for summary judgment. Further, Plaintiffs have not been prejudiced by the trial court's ruling on the motion to compel, and I would affirm.

ARTHUR McARDLE, KIMBERLY McARDLE, SELDON JONES, JACOB McARDLE, HANNAH McARDLE, BANNING McARDLE, AND FREDERICK S. BARBOUR AS GUARDIAN AD LITEM FOR SOPHIE McARDLE, PLAINTIFFS

v.

MISSION HOSPITAL, INC. AND MISSION HEALTH SYSTEM, INC., DEFENDANTS

No. COA16-554

Filed 15 August 2017

Mental Illness—involuntary commitment—initial examination—negligence—no special relationship to third parties

The trial court did not abuse its discretion in a negligence action by entering an order granting defendant hospital and health system company's motion to dismiss and denying plaintiff family's motion to amend as futile where defendant hospital owed no legal duty to plaintiff family during an initial examination of plaintiffs' relative (a dishonorably discharged Marine and drug abuser) prior to an involuntary commitment. Defendants did not assume custody or a legal right to control the relative under the mental health statutes of N.C.G.S. § 122C-261 et seq., and there was no special relationship creating a duty to third parties for harm resulting from an examiner's recommendation against involuntary commitment.

Appeal by Plaintiffs from Order entered 21 January 2016 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 29 November 2016.

Twiggs, Strickland & Rabenau, by Donald R. Strickland, Karen M. Rabenau, and Katherine A. King, for Plaintiffs-Appellants.

Roberts & Stevens, P.A., by Phillip T. Jackson and Eric P. Edgerton, and Patla, Straus, Robinson & Moore, P.A., by Richard S. Daniels, for Defendants-Appellees.

INMAN, Judge.

> [C]ompassion is a natural feeling . . . that hurries us without reflection to the relief of those who are in distress: it is this which in a state of nature supplies the place of laws, morals and virtues . . . . [T]he origin of society and law . . . irretrievably destroyed natural liberty . . . and serve as a substitute for natural compassion, which lost, when applied to societies, almost all the influence it had over individuals . . . . The people having in respect of their social relations concentrated all their wills in one, . . . becom[ing] so many fundamental laws, obligatory on all the members of the State without exception, and one of these articles regulates the choice and power of the magistrates appointed to watch over the execution of the rest.

Jean-Jacques Rousseau, *A Discourse on the Origin and Basis of Inequality, in The Social Contract & Discourses by Jean-Jacques Rousseau* 155, 199-228 (G. D. H. Cole trans., London, J. M. Dent & Sons Ltd., 1913) (1754).

> "[E]very law is universal, and there are some things about which it is not possible to speak rightly when speaking universally."

Aristotle, *Nicomachean Ethics* 100 (Joe Sachs trans. 2002).

When a respondent in an involuntary commitment proceeding is delivered to a hospital or other facility for an initial examination to recommend whether commitment without the respondent's consent is required, neither the examiner nor the hospital or other facility obtains custody or a legal right to control the respondent unless and until involuntary commitment is recommended by the examiner. For this reason, neither the examiner nor the facility owes a duty to third parties for harm resulting from an examiner's recommendation against involuntary commitment, even if the examination failed to comply with statutory requirements.

Arthur and Kimberly McArdle and their five surviving children (collectively "the McArdles") appeal a trial court's order of 21 January 2016 denying their motion to amend their complaint as futile and granting a motion to dismiss by Mission Hospital, Inc. and Mission Health System, Inc. (collectively "Defendants") on the basis that Defendants owed the McArdles no legal duty. We affirm.

I. Background and Procedural History

The McArdles' complaint and proposed amended complaint include the following allegations:

Joshua McArdle ("Joshua"), now deceased, was diagnosed with post-traumatic stress disorder (PTSD) after serving a tour of duty in a hostile area of Iraq as a United States Marine. He received an "Other than Honorable" discharge from the Marine Corps in 2008 due to drug abuse, which precluded him from receiving subsequent care through the Veterans Administration (VA). After discharge, Joshua received no mental health or substance abuse treatment. He abused alcohol, cocaine, Percocet, and marijuana, experienced extreme paranoia, and amassed a personal arsenal of weapons and ammunition.

The McArdles and other family members, including Joshua, gathered in Asheville, North Carolina in the days preceding the planned wedding of Joshua's sister Seldon Jones ("Seldon"), née McArdle, on 11 May 2013. During the pre-wedding gathering Joshua engaged in episodes of violence on 7 and 8 May 2013, including: (1) choking his brother Banning McArdle ("Banning") while Banning was driving, after Banning refused to take Joshua to buy drugs; (2) entering his brother Jacob McArdle's ("Jacob") house at night and awakening and beating Jacob; and (3) attempting to break down the door of his parents' house and again attacking Jacob. Joshua also threatened to beat up his biological father when he arrived in town for the wedding. During the altercation at the family home on the morning of 8 May 2013, Seldon called 911. Sheriff's deputies arrived at the home shortly after Joshua left.

One of the responding deputies suggested that, rather than having Joshua arrested, the family should instead pursue involuntary commitment. The McArdles all agreed on this course of action, and Arthur McArdle executed an Affidavit and Petition for Involuntary Commitment (the "Petition") before the Buncombe County Assistant Clerk of Superior Court on the same morning. Arthur's Petition sought involuntary commitment of Joshua on the grounds that he was: (1) mentally ill and dangerous to self or others and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness; and (2) a substance abuser and dangerous to self or others.

The Buncombe County Assistant Clerk of Superior Court issued a Findings and Custody Order for Involuntary Commitment (the "Custody Order") on 8 May 2013 finding reasonable grounds to believe that the allegations in the Petition were true and directing law enforcement

officers to take Joshua into custody for an initial examination ("First Examination") as required by N.C. Gen. Stat. §§ 122C-263 and 122C-283.[1] The Buncombe County Sheriff's Department took Joshua into custody and delivered him to Mission Hospital at 1:45 p.m. on the same day.

At approximately 3:30 p.m. on 8 May 2013, nursing staff in Mission Hospital's Emergency Department noted initial observations that Joshua appeared "Anxious" with "Impaired Focus/Concentration" and that he "Denies suicidal ideation/homicidal ideation at present" and "Minimizes problem." At approximately 4:25 p.m., Mission Hospital emergency medicine physician James Roberson, M.D. ("Dr. Roberson") referred Joshua to the hospital's psychiatric unit for the required First Examination.

In the psychiatric unit at 4:40 p.m., a Patient/Family Services Consult was performed by clinical social worker David Weiner, who indicated in Joshua's hospital chart that:

> [t]he patient is under community petition by his father. The petition was due to a physical altercation with his brother wherein the patient tried to strangle him. The patient denies the severity of this altercation. The patient's family reports that the patient is an ex-Marine and might be struggling with PTSD. Patient to be assessed by next available PC.

Subsequently on 8 May 2013, Dina Paul ("Paul"), a licensed clinical social worker and employee of Defendants, conducted an examination of Joshua. Paul interviewed Joshua and also received statements from several family members, including Arthur, Banning, and Jacob. Paul was apprised of Joshua's alcohol and marijuana use, a drug screen testing positive for cannabinoids, his "Other than Honorable" discharge from the Marine Corps for drug abuse, his lack of current VA benefits, and Joshua's acknowledgment of anger issues since returning from Iraq and his desire for treatment for PTSD. Paul wrote an Evaluation report to Dr. Roberson recommending against inpatient commitment for Joshua. Paul's report concluded that "[Patient] can benefit from return to home with referral to VA for help with benefits and therapy. [Patient] in agreement with these recommendations."

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1. While these statutes do not explicitly term the examinations performed thereunder as "First Examinations," both N.C. Gen. Stat. §§ 122C-263 (2015) and 122C-283 (2015) are titled "Duties of law-enforcement officer; first examination by physician or eligible psychologist." In the interest of brevity, a reference to a "First Examination" in this opinion shall refer to an examination under either of these statutes unless specifically stated otherwise.

The McArdles allege Paul was not qualified by statute or regulation to perform the First Examination.

After discussion with Paul, Dr. Roberson signed the North Carolina Department of Health and Human Services form entitled "Examination and Recommendation to Determine Necessity for Involuntary Commitment" (the "Recommendation"), indicating that Joshua did not meet the criteria for inpatient commitment. The Recommendation stated that Joshua was "able at this time to contract for safety – denies suicidal ideation and homicidal ideation with no psychotic symptoms. He has strong social supports, gainful employment. No psychiatric history." Rather than indicating that Joshua was mentally ill and/or a substance abuser and dangerous to himself or others, the Recommendation noted that Joshua was "none of the above." It further stated that "[t]he brothers reported they do not feel that the patient is a danger to anyone else or himself" but did not mention that Arthur had expressed the concern to Paul that Joshua was a danger to himself and others. The Recommendation included the note that Joshua "is in the process of getting care established at the VA medical center" without addressing Joshua's eligibility for such benefits, which is discretionary for one discharged under "Other than Honorable" conditions. Mission Hospital discharged Joshua at approximately 10:09 p.m. on 8 May 2013, without notifying the McArdles.

Three nights later, at approximately 1:20 a.m. on 11 May 2013, Joshua broke into the McArdle family residence.[2] He shot and severely wounded Banning and Arthur before fatally shooting himself in the head. When Joshua shot himself, his body fell on his mother Kimberly, breaking her leg. Sisters Seldon, Hannah, and Sophie witnessed the shootings and their aftermath. After learning of the incident, Jacob rushed to Mission Hospital where he witnessed Arthur and Banning being treated for life-threatening injuries.

The McArdles filed suit on 29 December 2014 alleging negligence, gross negligence, and negligent infliction of emotional distress arising from the acts and omissions of Defendants and their employees in the First Examination. Defendants filed their answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 9 March 2015. The McArdles filed a motion to amend their complaint on 23 November 2015, and the trial court heard both Defendants'

2. A toxicology report indicated that at the time of Joshua's death his blood alcohol content was .103 g/DL.

motion to dismiss and the McArdles' motion to amend on 30 November 2015. On 21 January 2016, the trial court entered its order granting the motion to dismiss and denying the motion to amend as futile, holding that Defendants owed the McArdles no legal duty. The McArdles timely appealed.

II. Analysis

We review a denial of a motion to amend for abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). A dismissal under Rule 12(b)(6), by contrast, is reviewed *de novo*. *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 585 (2008). In applying such a standard, the issue before the appellate court:

> is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (internal citations and quotation marks omitted). However, "conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (internal quotation marks omitted).

The trial court dismissed the McArdles' complaint and denied their motion to amend for futility on the basis that no set of facts or circumstances "would support a finding that the Defendants owed the Plaintiffs any legally recognized duty . . . ." We must therefore determine whether Defendants, in conducting their First Examination of Joshua, owed a legal duty to the McArdles as third parties.[3] In resolving this question, we first review our state's common law concerning duties to third parties

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3. The case authorities cited in this opinion use the terms "third persons" or "third parties" to refer to either the actor whose wrongful acts directly caused injury to a litigant or, alternatively, to the litigant claiming injury by said wrongful acts. *Compare Scadden v. Holt*, 222 N.C. App. 799, 802, 733 S.E.2d 90, 92 (2012) ("In general, there is neither a duty to control the actions of a third party, nor to protect another from a third party.") *with Davis v. N. C. Dept. of Human Resources*, 121 N.C. App. 105, 113, 465 S.E.2d 2, 7 (1995) ("Rivers was involuntarily committed into defendant's custody and it, therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers."). Because both parties in this action adopted the latter usage in their briefs by referring to Plaintiffs as the third parties in the tort analysis, we do the same except when quoting other courts' opinions.

and then determine whether, under the statutory scheme for involuntary commitments set forth in N.C. Gen. Stat. §§ 122C-261 and 122C-281 *et seq.*, liability for the McArdles' injuries can arise from Defendants' First Examination.

A. Common Law Liability for Breach of Duty to Third Parties

"In general, there is neither a duty to control the actions of a third party, nor to protect another from a third party." *Scadden*, N.C. App. at 802, 733 S.E.2d at 92 (citing *King v. Durham Cnty. Mental Health Developmental Disabilities and Substance Abuse Auth.*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994)). There is, however, "an exception to the general rule . . . where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct . . . ." *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283-84, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996) (internal citations omitted).

> A finding that a special relationship exists and imposes a duty to control is justified where "(1) the defendant knows or should know of the third person's violent propensities *and* (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts."

Scadden¸ 222 N.C. App. at 803, 733 S.E.2d at 93 (emphasis added in original) (quoting *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 330, 626 S.E.2d 263, 269 (2006)). "The ability and opportunity to control must be more than mere physical ability to control. Rather, it must rise to the level of custody, or legal right to control." *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93.

This Court has held that a special relationship exists when an individual is involuntarily committed, negligently released by the defendant, and the negligent release proximately results in harm to a third-party plaintiff. *See, e.g.*, *Pangburn v. Saad*, 73 N.C. App. 336, 338-39, 326 S.E.2d 365, 367-68 (1985) (holding a duty to third parties existed where plaintiff alleged that defendant negligently released an involuntarily committed patient who then stabbed plaintiff approximately 20 times); *Davis*, 121 N.C. App. at 113, 465 S.E.2d at 7 ("Rivers was involuntarily committed into defendant's custody and it, therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers."); *Gregory v. Kilbrid*e, 150 N.C. App. 601, 607, 565 S.E.2d 685, 690 (2002)

("[A]n independent duty arises to protect third persons from harm by the release of a mental patient who is involuntarily committed." (citation omitted)). But we have not held that such a duty to third parties existed when a voluntarily committed mental patient was released. *See King*, 113 N.C. App. at 346-47, 439 S.E.2d at 775 (holding that an individual's voluntary participation in the Willie M. program, though it obligated the defendants to provide services, did not confer upon defendants custody over the individual or the ability to control him absent a "court order").

In a related line of cases cited favorably by this Court, the Fourth Circuit's appellate and district courts have interpreted North Carolina law to hold that this State does not recognize an affirmative duty on the part of psychiatric care providers to seek involuntary commitment for individuals. *See Currie v. U.S.*, 836 F.2d 209, 214 (4th Cir. 1987) ("[I]t [is] most unlikely that the North Carolina Supreme Court would hold that North Carolina's public policy and its tort law would impose tort liabilities upon the psychiatrists at the VA hospital for a mistake in not seeking involuntary commitment."); *Cantrell v. U.S.*, 735 F. Supp. 670, 673 (E.D.N.C. 1988) ("North Carolina law d[oes] not impose an affirmative duty on mental health professionals to seek an involuntary commitment of a patient." (citing *Currie* at 212)); *Davis*, 121 N.C. App. at 112, 465 S.E.2d at 7 (citing *Currie* at 212-13); *King*, 113 N.C. App. at 347, 439 S.E.2d at 775 (citing *Cantrell* at 673).

While case law provides guidance as to the duty (or lack thereof) of mental healthcare providers to third parties prior to the commencement of involuntary commitment procedures, after involuntary commitment, and where an individual has been voluntarily committed, the issue of whether a special relationship creating a duty to third parties exists in the pre-commitment stages of an involuntary commitment proceeding is one of first impression.

The narrow question before this Court is whether, at the First Examination prior to a recommendation of involuntary commitment, a defendant examining a respondent has "custody, or [a] legal right to control" the respondent and therefore owes a duty to third parties. *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93. The McArdles argue that "custody" and "legal right to control" are distinct, such that one party may be vested with the former and another with the latter. Assuming *arguendo* that such a distinction exists, we are required to examine our involuntary commitment statutes alongside the Custody Order in this case to determine whether "custody, or [a] legal right to control" was ever vested in Defendants. *Id.* at 803, 733 S.E.2d at 93.

B. Custody, Control, and the Involuntary Commitment Statutory Scheme

Arthur McArdle instituted Joshua's involuntary commitment proceeding by executing an Affidavit and Petition for Involuntary Commitment under both N.C. Gen. Stat. §§ 122C-261 *et seq.* (2015) (allowing for the involuntary commitment of the mentally ill) and N.C. Gen. Stat. §§ 122C-281 *et seq.* (2015) (allowing for the involuntary commitment of substance abusers). Under both N.C. Gen. Stat. §§ 122C-261 and 122C-281, a clerk or magistrate "shall issue an order to a law enforcement officer or any other person authorized . . . to take the respondent into custody for examination by a physician or eligible psychologist" upon finding reasonable grounds that the facts alleged in the affidavit are true and the respondent is probably mentally ill (under N.C. Gen. Stat. § 122C-261(b)) or a substance abuser (under N.C. Gen. Stat. 122C-281(b)), and that the individual is a danger to himself or others.[4] N.C. Gen. Stat. § 122C-261(b); *see also* N.C. Gen. Stat. § 122C-281(b) (using virtually identical language). Upon receipt of such an order under either statute, "a law enforcement officer or other person designated in the order shall take the respondent into custody within 24 hours after the order is signed . . . ." N.C. Gen. Stat. § 122C-261(e); *see also* N.C. Gen. Stat. § 122C-281(e) (using virtually identical language).

Once a respondent is in the custody of a law enforcement officer or other properly designated individual, N.C. Gen. Stat. §§ 122C-263(a) and 122C-283(a) require that the respondent be transported to an "area facility for examination by a physician or eligible psychologist; if a physician or eligible psychologist is not available in the area facility, the person designated to provide transportation shall take the respondent to any physician or eligible psychologist locally available." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a) (using virtually identical language). If neither option is available, "the respondent may be temporarily detained in an area facility," and, failing that, "the respondent may be detained under appropriate supervision in the respondent's home, in a private hospital or clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a).[5]

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4. We acknowledge that a clerk or magistrate shall also issue a custody order under N.C. Gen. Stat. § 122C-261(b) upon finding it probable that the individual is mentally ill and needs treatment to avoid deterioration leading to predictable dangerousness.

5. The precise language of N.C. Gen. Stat. § 122C-283(a) (involuntary commitment for substance abuse) differs from the above-quoted language of N.C. Gen. Stat.§ 122C-263(a)

Upon "present[ation] for examination" by the respondent's custodian to a physician or eligible psychologist, N.C. Gen. Stat. §§ 122C-263(c) and 122C-283(c) require that said physician or eligible psychologist conduct a First Examination. N.C. Gen. Stat. § 122C-263(c) requires, at a minimum, an examination of the respondent's current and prior history of mental illness or retardation, his or her dangerousness to self or others under N.C. Gen. Stat. § 122C-3(11), his "[a]bility to survive safely without inpatient commitment," and his capacity to make decisions concerning his care. The First Examination for involuntary commitment for substance abuse is similar, requiring the examiner to review the respondent's "[c]urrent and previous substance abuse" and to determine if the respondent is dangerous to himself or others. N.C. Gen. Stat. § 122C-283(c).

Depending on the evaluation of the necessary factors in a First Examination, the involuntary commitment statutes dictate certain discrete outcomes: inpatient commitment, outpatient commitment, or a termination of proceedings and a release from custody by law enforcement or other properly designated individual. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d). The medical provider conducting a First Examination must make certain findings, and, depending on the findings, the statutes compel either commitment (inpatient or outpatient) or release. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d). The statutes provide for no additional alternative results. An examiner does not have discretion, for example, to release a respondent to an outpatient provider after making findings that, by statutory mandate, require inpatient commitment.[6]

(involuntary commitment for mental illness) only in respect to the pronouns used and the omission of the clause pertaining to state mental health facilities.

6. The statutes are less constraining on a course of treatment that a district court can order following examinations recommending involuntary commitment. For example, N.C. Gen. Stat. § 122C-271(b)(2) states that a court "may order inpatient commitment" for mentally ill individuals who are dangerous to self or others, and it "*may also* [order such a respondent] be committed to a combination of inpatient and outpatient commitment . . . ." (emphasis added). This is in contrast to the statutory requirement in the same subsection that "[i]f the court does not find that the respondent meets either of the commitment criteria . . . , the respondent *shall* be discharged." N.C. Gen. Stat. § 122C-271(b)(3) (emphasis added). In cases of involuntary commitment for substance abuse, the trial court does not actually determine whether inpatient or outpatient treatment is appropriate; rather, if the court orders commitment pursuant to the statute, N.C. Gen. Stat. § 122C-287, "[t]he area authority or physician . . . may prescribe or administer [the commitment] . . . either on an outpatient basis or in a 24-hour facility." N.C. Gen. Stat. § 122C-290(a). This permissive language is entirely absent from the statutes concerning First Examinations, which instead employ the mandatory "*shall* recommend," with outcomes dictated by whether the

If inpatient commitment is compelled by findings made by an examiner, the respondent is delivered by law enforcement or other properly designated individual to a "24-hour facility described in [N.C. Gen. Stat. §] 122C-252 [titled 'Twenty-four hour facilities for custody and treatment of involuntary clients']." N.C. Gen. Stat. §§ 122C-263(d)(2) and 122C-283(d)(1). When a 24-hour facility is not available or appropriate for the medical care of a mentally ill respondent, the respondent "may be temporarily detained under appropriate supervision at the site of the first examination[;]" if, after seven days of temporary detention, no 24-hour facility becomes available or such a facility is no longer appropriate, the involuntary commitment proceedings are terminated. N.C. Gen. Stat. § 122C-263(d)(2). If proceedings are terminated, a respondent in a mental illness commitment proceeding is to be returned by law enforcement or an individual properly designated to his home or that of another consenting person and "the respondent shall be released from custody." N.C. Gen. Stat. § 122C-263(d)(3). Upon termination of proceedings in a substance abuse case, the statute simply states that "the respondent shall be released . . . ." N.C. Gen. Stat. § 12C-283(d)(2). In such circumstances, no involuntary commitment occurs. *Waldron v. Batten*, 191 N.C. App. 237, 241, 662 S.E.2d 568, 570 (2008) (holding that where a First Examination is administered to a respondent and no commitment is recommended, no involuntary commitment occurs).

The involuntary commitment statutes positively grant custody at the First Examination stage only to law enforcement or another properly designated individual by order of the clerk pursuant to N.C. Gen. Stat. §§ 122C-261(b) and 122C-281(b). Under those statutes, "the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination . . . ." N.C. Gen. Stat. § 122C-261(b); *see also* N.C. Gen. Stat. § 122C-281(b). Taking the McArdles' allegations as true, the Custody Order issued in this case did exactly that; it directed the Buncombe County Sheriff's Department to "take [Joshua] into custody within 24 hours after this order is signed and take [him] for examination by a person authorized by law to conduct the examination." (internal quotation marks omitted).

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required findings are found in the positive or negative, and there is no provision allowing for a recommendation of a combination of inpatient and outpatient commitment in a First Examination. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d) (emphasis added). In a First Examination for substance abuse, the examiner must recommend commitment upon the finding of certain factors, but in doing so may allow the respondent to "be released or be held at a 24-hour facility pending hearing . . . ." N.C. Gen. Stat. § 122C-283(d)(1).

Following issuance of such an order and "[w]ithout unnecessary delay after assuming custody, the law enforcement officer . . . shall take the respondent . . . for examination by a physician or eligible psychologist . . . ." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a).[7] No language in these statutes shifts custody from law enforcement to the examiner (or anyone else) in a First Examination; indeed, the First Examination in a mental illness proceeding may even be conducted via "telemedicine" outside the examiner's physical presence. N.C. Gen. Stat. § 122C-263(c). As far as the import of the location of the First Examination is concerned, we note that the involuntary commitment statutes have specifically delineated between "24-hour facilities . . . for the *custody* and treatment of involuntary clients[,]" N.C. Gen. Stat. § 122C-252 (2015) (emphasis added), and other locations for evaluations and examinations. Notably, there is no requirement that the First Examination be conducted at such a facility.[8]

A plain reading of the statutes' language demonstrates that, following a First Examination, custody continues with law enforcement until the respondent is, in cases recommending commitment, transferred to a 24-hour facility "for the custody and treatment of involuntary clients[,]" N.C. Gen. Stat. § 122C-252, or, in cases where commitment is not recommended, returned to a residence and "released from custody." N.C. Gen.

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7. We note that these statutes impose the duty on law enforcement (or another properly designated individual) to deliver the individual to a properly qualified examiner or, failing that, to temporarily detain him until such delivery can be accomplished. N.C. Gen. Stat. §§ 122C-263(a) and 122C-283(a). Indeed, the proposed amended complaint in this case specifically alleges that the Custody Order ordered the Buncombe County Sheriff's Office to "take [Joshua] into custody within 24 hours after this order is signed and take the respondent for examination *by a person authorized by law to conduct the examination*." (internal quotation marks omitted) (emphasis added). It also alleges that, upon delivery of an involuntary commitment respondent to Mission Hospital, a Buncombe County Sheriff's deputy typically fills out a Return of Service section in the Findings and Custody Order acknowledging that " 'the respondent was *presented to an authorized examiner*' and providing the . . . Name of Examiner . . . ." (emphasis added). The proposed amended complaint further alleges that the Buncombe County Sheriff's deputy filled out this form when he dropped off Joshua at 1:45 p.m. and left, but that Joshua was not referred to the psychiatric unit until 4:25 p.m. Per the statute and as alleged in the proposed amended complaint, the Buncombe County Sheriff's Department failed to deliver Joshua to a qualified examiner or to detain him until such an examiner was available. We do not consider the Buncombe County Sheriff's Department's potential liability, however, as it is not a party to this action.

8. The statutes contemplate that the First Examination can occur in a host of locations that may or may not be capable of assuming custody, including "in the respondent's home, in a private hospital or a clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a) (providing similar locations).

Stat. §§ 122C-263(d); *see also* N.C. Gen. Stat. § 122C-283(d). It necessarily follows that the Buncombe County Sheriff's Department assumed custody of Joshua pursuant to the Custody Order and the applicable statutes until he was delivered to a 24-hour facility on a recommendation of commitment or, in the alternative, transported to his home or the home of a consenting individual following the termination of the proceeding. Because Defendants did not assume custody of Joshua under the statutory scheme, it cannot serve as the basis of a special relationship creating a duty to third parties. *See*, *e.g.*, *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93 (noting the requirement of "custody, or legal right to control.").

This reading of the statutes comports with our legislature's enactment of Session Law 2013-114 , which specifically granted facilities in Ashe, Cumberland, and Wilkes Counties the ability to detain, pursue, and return individuals in the course of a First Examination *in the place of* law enforcement. 2013 N.C. Sess. Laws 235-36. Presuming as we must that our legislature passed Session Law 2013-114 with full knowledge of the involuntary commitment scheme, *Dickson v. Rucho*, 366 N.C. 332, 341, 737 S.E.2d 362, 369 (2013), and acknowledging the limitation of its effect to only three counties, its enactment confirms our conclusion that the legislature has not seen fit, as a general matter, to confer custody of an involuntary commitment respondent on anyone other than law enforcement or other person properly designated by the clerk or magistrate prior to and during a First Examination.

Beyond custody, the McArdles assert several well-stated arguments that the involuntary commitment scheme bestowed upon Defendants a legal right to control Joshua irrespective of custody. Assuming *arguendo* that there is a distinction between "custody" and "legal right to control," we nonetheless ultimately find the McArdles' arguments unavailing.

The McArdles argue that because "Defendants had the legal right to: (1) Retain Joshua in their 24-hour facility [by recommending involuntary commitment for mental illness] . . . ; and/or (2) Retain Joshua in their 24-hour facility [by recommending involuntary commitment for substance abuse,]" they had the legal right to control Joshua, creating a special relationship subjecting Defendants to liability to third persons. The McArdles argue that Defendants therefore "ha[d] the legal right to mandate that Joshua continue to remain restrained, [and] the corresponding positive duty to [decide] under [N.C. Gen. Stat.] § 122C-263(d) whether to further restrain or release." In advocating for the existence of the positive duty and legal right to mandate Joshua's restraint, the McArdles rightly note that the compulsory "shall" verbiage employed in

N.C. Gen. Stat. § 122C-263(d) concerning the required findings in a First Examination is "the classic language of duty." *See McLean v. Sale*, 38 N.C. App. 520, 523, 248 S.E.2d 372, 374 (1978) (holding that the use of "shall" in an earlier incarnation of North Carolina's involuntary commitment statute "imposes a positive duty on the defendant to make the examination . . . ."). However, we hold that the nature of the duty imposed, in light of the particulars of the statutory scheme, is insufficient to impose a "special relationship" between Defendants and the McArdles.

N.C. Gen. Stat. § 122C-263(d) imposes a statutory duty on Defendants, insofar as the examiner in a First Examination "shall make the following determinations . . . ." The duty's mere existence, however, does not mean that it extends beyond Joshua to third parties.

This Court has previously held that "N.C.G.S. § 122C-263 and the related involuntary commitment statutes are not public safety statutes." *Kilbride*, 150 N.C. App. at 610-11, 565 S.E.2d at 692. The duties provided in these statutes are intended to protect the due process rights of the respondent, not the safety of the public. *Id.* at 610-11, 565 S.E.2d at 692 ("The primary purpose of an involuntary commitment proceeding is to protect the person who, *after due process*, has been found to be both mentally ill and imminently dangerous . . . . The purpose of the statutes is . . . to protect the rights of the individual who is the subject of the involuntary commitment proceedings." (emphasis added) (internal citations omitted)).

Defendants had no right to control Joshua at the time of the alleged breach of duty to Joshua because it occurred prior to his admission to Defendants' care. The McArdles contend that the examiner's statutory authority to make findings about an involuntary commitment petition respondent means "[t]he power to release or not release is the first examiner's[.]" But the examiner has no discretion whether or not to release a respondent. It is the *statutes* that dictate the result on the basis of the examiner's findings, and the examiner is not authorized by law to deviate from those statutorily-imposed results. Nor may the examiner assume control over the respondent. In short, a right or duty to make a determination that may result in assuming a legal right to control is distinct from the legal right to control itself, and Defendants " 'had no legal right to mandate' [Joshua's] behavior" because the statutory mandate for commitment was never triggered. *Scadden*, 222 N.C. App. at 805-06, 733 S.E.2d at 94 (quoting *King*, 113 N.C. App. at 347, 439 S.E.2d at 775).[9]

9. A similar line was drawn in *Cantrell*. 735 F. Supp. at 673. There, the federal district court noted that although a mental health provider may, under N.C. Gen. Stat. § 122C-212(b),

While it is true that "[i]t is the finding by the physician . . . that directly results in the restraint of respondent[,]" *McLean*, 38 N.C. App. at 523, the examiner at a First Examination is empowered only to make certain findings, and it is only after specific findings are made that control is exercised.[10]

Application of our law to the McArdles' logic aptly demonstrates this distinction. N.C. Gen. Stat. § 122C-262(a) provides: "*Anyone* . . . who has knowledge of an individual who is subject to inpatient commitment . . . and who requires immediate hospitalization to prevent harm to self or others, may transport the individual directly to an area facility or other place [for a First Examination] . . . ." N.C. Gen. Stat. § 122C-262(a) (emphasis added). A person may take control of such a person absent an order for custody under N.C. Gen. Stat. § 122C-261. *See In re Woodie*, 116 N.C. App. 425, 429, 448 S.E.2d 142, 144 (1994) (holding there was no error in an involuntary commitment action where police transported an individual to a hospital for examination by a physician under N.C. Gen. Stat. § 122C-262 "without having a petition for an order to take appellant into custody in the court file as required by [N.C. Gen. Stat.] § 122C-261 (1993)."). Thus, under particular circumstances, any member of the public may have the statutorily-provided option of exercising a degree of control over a person that is equivalent to, and otherwise reserved for, a custody order under the involuntary commitment statutes. If we were to hold, as the McArdles' logic dictates, that "custody, or [a] legal right to control[,]" *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93, is equivalent to "the legal ability" to assume the mantle of a legal right to control, then *any* person electing not to transport an individual consistent with N.C. Gen. Stat. § 122C-262(a) would fall within the "special relationship" giving rise to liability to others, if the person, per the very terms of N.C. Gen. Stat. § 122C-262, knew of the individual's "violent propensities and . . . ha[d] the ability and opportunity to control" the individual. *Stein*, 360 N.C. at 330, 626 S.E.2d at 269. Such a holding would upend the general rule that "there is neither a duty to control the actions of a third party, nor to protect another from a third party." *Scadden*, 222 N.C. App. at 802,

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hold a voluntarily committed patient for 72 hours following a request for discharge, this ability did not rise to level of control sufficient to create a special relationship imposing liability to third parties. *Id.* at 673. Instead, the provider's ability to hold an individual for 72 hours merely "enables the institution to *attempt* to gain control which *it does not have over the patient* by seeking involuntary commitment." *Id.* at 673 (emphasis added).

10. We note that the pleadings in this matter also identify this distinction: the specific factual allegations of negligence in the McArdles' original and amended complaints pertain to actions or omissions in the *First Examination itself* rather than in the exercise of any positive control over Joshua.

733 S.E.2d at 92; *see also Currie*, 836 F.2d at 214 ("[I]t [is] most unlikely that the North Carolina Supreme Court would hold that North Carolina's public policy and its tort law would impose tort liabilities upon the psychiatrists at the VA hospital for a mistake in not seeking involuntary commitment.") *and Cantrell*, 735 F. Supp. at 672-73 ("North Carolina law d[oes] not impose an affirmative duty on mental health professionals to seek an involuntary commitment of a patient." (citing *Currie*, 836 F.2d at 212)). We therefore decline to adopt the holding advocated by the McArdles to prevent "the exception [from] swallow[ing] the rule . . . ." *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93. The exception creating liability to claims by third parties in the involuntary commitment context remains unchanged: "[W]here a person *has been involuntarily committed* . . . there is a duty on the institution to exercise control over the patient . . . ." *Davis*, 121 N.C. App. at 112, 465 S.E.2d at 7 (emphasis added); *see also King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (noting the exception applies in "institution-involuntarily committed mental patient" cases).

For the same reason that we affirm the trial court's conclusion that Defendants owed no duty to the McArdles, we also affirm the trial court's denial of the McArdles' motion to amend the complaint, because the complaint could not be amended to state a valid cause of action against Defendants.

III. Conclusion

The McArdles' original and proposed amended complaints chronicle a terrible series of events and profound suffering. Even so, our sympathy does not empower us to step beyond the confines of the law: "Absent legal grounds for visiting civil liability on defendant[s], our courts cannot offer plaintiffs the requested remedy." *Stein*, 360 N.C. at 325, 626 S.E.2d at 266. Because we hold that Defendants did not have custody of or a legal right to control Joshua when conducting their First Examination, no special relationship was created imposing liability, and the trial court did not abuse its discretion in denying the McArdles' motion to amend or commit reversible error in dismissing their complaint.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

MORRELL v. HARDIN CREEK, INC.

[255 N.C. App. 55 (2017)]

ANDREA MORRELL, G. PONY MORRELL, AND THE PASTA WENCH, INC., PLAINTIFFS
v.
HARDIN CREEK, INC., JOHN SIDNEY GREENE, AND HARDIN CREEK TIMBERFRAME AND MILLWORK, INC., DEFENDANTS

No. COA16-878

Filed 15 August 2017

1. Negligence—summary judgment—ambiguous commercial lease—burst water pipe—modified sprinkler system

The trial court erred in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by granting summary judgment in favor of all defendants on plaintiff lessee's negligence claims where the language in a commercial lease was ambiguous. Further, the issue of the various defendants' degree of involvement in modifying a sprinkler system was an issue to be resolved by the trial court on a motion for directed verdict.

2. Parties—motion to amend complaint—add party—reconsideration

The trial court's denial of plaintiff lessee's motion to amend a complaint to add E. Greene as a party defendant in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, needed to be reconsidered based on the reversal of the trial court's order granting summary judgment in favor of all defendants.

3. Appeal and Error—preservation of issues—failure to cite legal authority—failure to argue

The trial court did not err in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by denying defendant commercial landlord and construction company's counterclaims for breach of duty to maintain the leased premises and breach of contract where defendants failed to cite any legal authority or argue this issue.

4. Discovery—new discovery schedule—ambiguity in commercial lease

On remand in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, the trial court should consider setting a new discovery schedule

pursuant to N.C.G.S. § 1A-1, Rule 26 to allow the parties to complete discovery based on an ambiguity in the parties' commercial lease.

Judge BERGER dissenting.

Appeal by Plaintiffs from order entered 27 April 2016 by Judge William Coward in Watauga County Superior Court. Heard in the Court of Appeals 22 March 2017.

Capua Law Firm, P.A., by Paul A. Capua and Genevieve A. Mente, for Plaintiff-Appellants.

Wall Babcock LLP, by Joseph T. Carruthers and Lee D. Denton, for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Andrea Morrell ("Andrea"), G. Pony Morrell ("Morrell"), and The Pasta Wench, Inc. ("The Pasta Wench") (collectively "Plaintiffs") appeal the 27 April 2016 order by Judge William Coward granting summary judgment in favor of Hardin Creek, Inc. ("Hardin Creek"), John Sidney Greene ("S. Greene"), and Hardin Creek Timberframe and Millwork, Inc. ("Timberframe") (collectively "Defendants"), and dismissing Plaintiff's third party complaint against John Ellis Greene ("E. Greene") with prejudice. After review, we reverse the trial court's order and remand for further proceedings.

I. Facts and Background

Plaintiffs' forecast of the evidence tends to show the following. Andrea and Morrell are the founders and officers of The Pasta Wench. The Pasta Wench manufactures and distributes "specialty food products including homemade, organic raviolis and other pasta products." Hardin Creek is a commercial landlord. Timberframe is a timber manufacturing and construction company that builds and remodels residential and commercial buildings. S. Greene is the president of Hardin Creek, and the general contractor for Timberframe. E. Greene is S. Greene's father and owner of the property in question.

Andrea and Morrell started The Pasta Wench in April 2010. After experiencing success in local markets in Boone, North Carolina, Plaintiffs expanded to distribute their product across western North Carolina. Plaintiffs later contracted with Harris Teeter for regional distribution across North and South Carolina.

On 2 February 2011, Plaintiffs entered into a commercial lease ("the lease") with Hardin Creek for two units of a steel building located in Boone ("the premises"). Plaintiffs operated their business from the premises, and used the units as a kitchen and a pasta drying room. The lease contained several provisions concerning Plaintiffs' responsibility to obtain liability and property insurance and to indemnify Hardin Creek for damages. The relevant lease paragraphs are as follows:

> 5. Alterations. . . .
>
> . . . .
>
> (b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from negligence or the wrongful acts of his employees, representatives or visitors. However, and notwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.
>
> . . . .
>
> 8. Insurance: Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c).
>
> (a) Property Insurance: Tenant shall hold Landlord harmless for loss or damage by fire with regard to all of Tenant's furniture, fixtures, and equipment about or within the leased premises.
>
> (b) Liability Insurance: Tenant shall provide and keep in force for the protection of the general public and Landlord liability insurance against claims for bodily

> injury or death upon or near the leased premises and the sidewalks, streets and service and parking areas adjacent thereto to the extent of not less than $500,000.00 in respect to bodily injuries or death to any one person and the extent of not less than $500,000.00 for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than $100,000.00. The Tenant shall furnish Landlord with satisfactory evidence of such insurance within thirty (30) days of execution of this lease.

Despite the opening paragraph's language, Paragraph 8 contains no subparagraph (c).

In early 2012, the North Carolina Department of Agriculture and Consumer Services ("NCDA&CS") inspected the premises. The NCDA&CS determined the interior required modification to accommodate food production. The NCDA&CS particularly required "the open layout of the kitchen in Unit B–four conventionally framed walls exposed to the domed, steel roof trusses and insulation approximately 25 feet above–to be enclosed with an interior kitchen ceiling."

Plaintiffs and Hardin Creek agreed to extend the lease by five years. As part of this agreement, S. Greene agreed to modify the premises consistent with the NCDA&CS's requirements.[1] In addition to building a new kitchen ceiling, S. Greene raised the kitchen's interior walls so the new kitchen ceiling was level with the drying room's ceiling. S. Greene also lowered the sprinkler system's shower heads so they protruded through the new ceiling. S. Greene expanded the sprinkler system to cover the area over a walk-in cooler, and constructed a ladder to access the top of that cooler.[2]

On 7 January 2014, the temperature in Boone dropped into the single digits. The cold temperature froze the water in Plaintiffs' sprinkler system. Plaintiffs alleged the pipes froze because Defendants "created

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1. The terms of the agreement to extend the lease do not include S. Greene's promise to modify the premises. However, in their answer to Plaintiffs' complaint, Defendants admit S. Greene "on behalf of Hardin Creek, arranged to have modifications made to the premises at Hardin Creek's expense[.]"

2. Plaintiffs allege Hardin Creek, Timberframe, and S. Green were responsible for the modifications since each provided "construction and construction management services" to Plaintiffs.

two separate heating zones between the newly enclosed kitchen and the open area above it, rendering the HVAC thermostat in the kitchen useless for regulating air temperature above the kitchen ceiling where the fire sprinkler system pipes were located." Plaintiffs also alleged Defendants' workers negligently left a vent near the apex of the roof open after performing repairs in December 2013.

Plaintiffs sought monetary damages for negligence and breach of the implied warranty of workmanlike performance against all Defendants. Plaintiffs also sought monetary damages for constructive eviction and breach of the covenant of quiet enjoyment against Hardin Creek, Inc. Finally, Plaintiffs alleged unfair and deceptive trade practices against S. Greene and Hardin Creek, Inc. Plaintiffs additionally sought treble damages and attorneys' fees under the unfair and deceptive trade practices claim, and sought punitive damages "as a result of Defendants' willful and wanton conduct and indifference to [Plaintiffs'] rights." Plaintiffs attached copies of the lease and the lease extension agreement to their complaint.

On 2 March 2015, Defendants answered Plaintiffs' complaint as moving to dismiss Plaintiffs' claims. Defendants contended the lease was only between Hardin Creek and Plaintiffs. Defendants therefore asked the trial court to dismiss Plaintiffs' claims against Timberframe and S. Greene pursuant to Rule 12(b)(6). Defendants also moved to dismiss Plaintiffs' negligence, constructive eviction, and unfair and deceptive trade practices claims pursuant to Rule 12(b)(6). Defendants asserted the following affirmative defenses: (1) Plaintiffs were contributorily negligent in leaving the roof vent open; (2) Plaintiffs' assumption of the risk; (3) Plaintiffs' failure to mitigate damages; and (4) the damages were beyond the parties' reasonable expectation and are therefore barred by the economic loss doctrine.

In an order filed on 15 October 2015, the trial court set a case management conference and a discovery scheduling order ("scheduling order"). Both parties consented to the scheduling order which set the discovery deadline for 15 April 2015. The parties consented to an amended scheduling order on 25 January 2016. This amended scheduling order required the trial court to hear all dispositive motions not more than thirty days before the trial date, which the trial court set for the session beginning 6 June 2016.

On 8 March 2016, Defendants amended their answer and filed two counterclaims. First, Defendants alleged Plaintiffs negligently left the roof vent open and breached their duty to maintain the premises.

Second, Defendants claimed breach of contract. Under this second claim, Defendants alleged the lease obligated Plaintiffs to pay for repairs or damage due to Plaintiffs' negligence. Defendants sought monetary damages for each of these claims.

On 14 April 2016, Defendants moved for summary judgment.[3] Defendants contended the trial court should dismiss Plaintiffs' claims against Timberframe and S. Greene since only Hardin Creek was responsible for the premises' modifications. Defendants contended (1) the lease was only between Plaintiffs and Hardin Creek; (2) S. Greene only interacted with Plaintiffs on Hardin Creek's behalf, not Timberframe; and (3) any work Timberframe performed on the premises was done on Hardin Creek's behalf. Defendants also contended a lack of privity of contract to support Plaintiffs' claim against either Timberframe or S. Greene for breach of implied warranty of workmanlike performance. As to Plaintiffs' constructive eviction claim and breach of the covenant of quiet enjoyment claim, Defendants alleged Plaintiffs caused the flooding since Plaintiffs left the roof vent open. Also, Defendants alleged Plaintiffs quit the lease despite Hardin Creek's willingness to restore the premises within ninety days of the incident. Finally, Defendants contended the lease discharged Hardin Creek "from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss . . ." pursuant to Paragraph 5(b) of the lease.

On 15 April 2016, Plaintiffs filed a motion to amend their complaint to add E. Greene as a party defendant. Plaintiffs alleged negligence and breach of the implied warranty of workmanlike performance. Plaintiffs also alleged they learned through discovery E. Greene "operated and oversaw property management and supervised the construction activities on the property that [gave] rise to this lawsuit."

Also on 15 April 2016, Plaintiffs filed a motion to continue the hearings and to enlarge the scheduling order deadlines. Plaintiffs alleged Defendants purposely delayed discovery, and Plaintiffs were still taking depositions and reviewing transcripts. Plaintiffs contended Defendants' motion for summary judgment was "premature and prejudicial," and requested more time "to prepare and present their case" before the trial court heard arguments on the dispositive motions.

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3. Defendants complied with the deadline for dispositive motions in the amended scheduling order.

On 22 April 2016, Plaintiffs filed a third party complaint against E. Greene. This brought all five claims Plaintiffs alleged in their original complaint against E. Greene. On 25 April 2016, the trial court heard Plaintiffs' and Defendants' motions, as well as Plaintiffs' third party complaint. On 27 April 2016, the trial court granted summary judgment in favor of Defendants. The trial court found Plaintiffs presented "no plausible reasons why further discovery would shed any light on paragraph 5(b) in the Lease[.]" The trial court also found "paragraph 5(b) in the lease is not ambiguous and is a complete defense to the claims raised in the Complaint[.]"The trial court also *sua sponte* granted summary judgment in favor of Plaintiffs as to Defendants' counter claims. The trial court dismissed Plaintiffs' third party compliant against E. Green with prejudice, and dismissed Plaintiffs' motions to amend and continue as moot.

On 20 May 2016, Plaintiffs filed notice of appeal. Plaintiffs appealed the trial court's 27 April 2016 order and "all rulings and statements of the trial court that contributed to, served as predicate for, or were encompassed by the foregoing Order, including all statements and rulings made in Court during the hearing held April 25, 2016, and decision communicated April 27, 2016, to not hold further hearings." Pursuant to Rule 10(c) of the Rules of Appellate Procedure, Defendants notified Plaintiffs and this Court of its intent to appeal the trial court's grant of summary judgment in favor of Plaintiffs on the counterclaim in the event this Court reverses the trial court's grant of summary judgment in favor of Defendants.

II. Jurisdiction

Plaintiffs appeal a superior court's order in a civil action disposing of all the parties' issues. Therefore, this Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b) (2016).

III. Standard of Review

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). This Court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016). A party opposing a motion for summary judgment must only establish the existence of a genuine issue of material fact, and it need not show it would prevail on the issue at trial. *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526 (1976).

"Appellate review of a trial court's determination of whether a contract is ambiguous is *de novo*." *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998).

IV. Analysis

[1] Plaintiffs contend the trial court erred in granting summary judgment in favor of Defendants because the language of Paragraph 5(b) of the Lease is ambiguous. We agree.

This Court interprets the terms of a lease as it would any contract. *Martin v. Ray Lackey Enterprises, Inc.*¸ 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990) (citation omitted). "Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881 467 S.E.2d 410, 411 (1996). This Court derives the intent of the parties from the contract as a whole, rather than from any particular term or paragraph. *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) ("Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety.") (citation and internal quotation marks omitted). "[I]f there is uncertainty as to what the agreement is between the parties, a contract is ambiguous." *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008). "When an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury." *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989).

Here, in granting summary judgment in favor of Defendants, the trial court exclusively relied on the lease's language. Specifically, the trial court found Paragraph 5(b) was unambiguous and functioned as a complete defense to Plaintiffs' claims. However, we conclude the text of the lease, when considered in its entirety, fails to clearly state the parties' intentions and is ambiguous.

Paragraph 5(b) states the landlord and tenant discharge each other from "all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy." Paragraph 8 then purports to define the type and amount of insurance Defendants required Plaintiffs to carry. Paragraph 8 also includes the terms under which Plaintiffs would indemnify Defendants for damages covered by insurance. However, Paragraph 8 is incomplete. The opening sentence of Paragraph 8 states "Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c)." The text of subparagraphs (a) and (b) follow this sentence. Subparagraph 8(a), titled "Property Insurance," contains indemnification language and states Plaintiffs hold Hardin Creek harmless for damages or losses caused by fire to Plaintiffs' furniture, fixtures, and equipment. Subparagraph 8(b), titled "Liability Insurance," defines the types and amounts of liability insurance Defendants required Plaintiffs to carry. There is not a Subparagraph 8(c).

Both Subparagraph 5(b) and Paragraph 8 refer to limits on Hardin Creek's liability under the lease. The incomplete construction of Paragraph 8 creates an ambiguity as to the type and amount of insurance Hardin Creek required of Plaintiffs. The incomplete construction of Paragraph 8 also creates an ambiguity relating to the scope of Subparagraph 5(b). The language the trial court relied on in Subparagraph 5(b) refers to any "hazard covered by insurance on the leased premises." However, when Subparagraph 5(b) is read in connection with Paragraph 8, the exact meaning of the term "covered by insurance" is ambiguous. It is unclear whether that term refers to hazards covered only by insurance coverage as required by the lease, or whether that term is modified by the language in the missing subparagraph on indemnification.

Because the lease is ambiguous, and because the interpretation of an ambiguous lease is a question for the jury, the trial court erred in granting summary judgment in favor of Defendant Hardin Creek, Inc.

Even if this Court concluded the lease was unambiguous, the trial court still incorrectly found Paragraph 5(b) served as a complete release from liability. Generally, parties may contract to "bind themselves as they see fit" unless the contract violates the law or is against public policy. *Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (quoting *Hall*

v. Sinclair Refining Co., 242 N.C. 707, 709-10, 89 S.E.2d 185 (1953)). "However, contracts which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed[.]" *Id.* at 225, 522 S.E.2d at 800 (citation omitted). "The contract will never be so interpreted [to exempt liability for negligence] in the absence of clear and explicit words that such was the intent of the parties." *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190 (1953).

Here, the trial court ruled Paragraph 5(b) of the lease meant both parties intended to waive claims relating to any matter covered by insurance. Plaintiffs concede their insurance covered up to $60,000 for damages resulting from the flood. However, Plaintiffs contend they did not intend to waive claims for business losses not covered by insurance and caused by Defendants' negligence.

In *William F. Freeman, Inc. v. Alderman Photo Co.* this Court held a lease which only addresses insurance coverage and subrogation rights will not extend to exempt the parties from liability for negligence. 89 N.C. App. 73, 75, 365 S.E.2d 183, 185 (1988). There, the lease required the parties to insure their own property, and this Court concluded the parties included the subrogation clause to ensure each party would only be required to pay for damages to his own property. *Id.* at 76, 365 S.E.2d at 185. This Court reasoned because the lease contained "no clear, explicit words waiving liability for negligence[,]" it would not infer the parties intended to do so. *Id.* at 76, 365 S.E.2d at 185.

This Court later distinguished the lease in *Freeman* in *Lexington* at 226, 522 S.E.2d at 800 (1999). In *Lexington*, this Court concluded the terms of the lease contained an explicit waiver by each party of its right to recover against the other for loss covered by insurance. *Lexington* at 226, 522 S.E.2d at 801. Additionally, this Court concluded the lease "clearly and explicitly evidences the intent of each of the parties to relieve the other from all liability . . . including liability for negligence." *Id.* at 227, 522 S.E.2d at 801.

Even though the lease in the instant case states the parties "agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance," the lease does not explicitly state the parties contemplated to waive claims stemming from negligence. This Court will not infer the parties intended to exempt each other from liability for negligence where the lease does not contain specific language indicating the parties' intent to do so. *See Freeman* at 76, 365 S.E.2d at 185. Therefore, the trial court erred in interpreting Paragraph 5(b)

as a complete release from all liability when that Paragraph did not contain language explicitly covering negligence.

In negligence cases, granting summary judgment is rare. Here the facts support a violation of a safety statute to wit: The pertinent provision of the North Carolina State Building Code states "[a]ll areas used for commercial or institutional food preparation and storage facilities adjacent thereto shall be provided with an automatic sprinkler system." N.C. Gen. Stat. § 143-138(m)(2) (2017). "[T]he [North Carolina State Building] Code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the [Building] Code such that the violation proximately causes injury or damage." *Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (2001) (quoting *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375 (1988)). "[A] violation of the North Carolina Building Code constitutes negligence per se because the Code is a statute to promote the safety of others." *Id.* at 684, 551 S.E.2d at 223. The owner of a building is not negligent *per se* for a violation of the North Carolina Building Code unless: "(1) the owner knew or should have known of the [Building] Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990).

Here, Plaintiffs alleged Defendants owed a duty to Plaintiffs "to inspect, construct, and alter the Premises in a workmanlike manner such that it would be . . . in accordance with local building codes, building plans, and industry standards." Plaintiffs also alleged "Defendants were warned that the insulation in the building was inadequate to properly protect the sprinkler systems during cold weather[.]" Finally, Plaintiffs alleged they suffered damages as a "direct and proximate cause" of Defendants' negligence. Based on our review of these pleadings, along with the provisions of the North Carolina Building Code, we conclude Plaintiffs sufficiently alleged negligence to survive Defendants' motion for summary judgment.

We now address this case's procedural posture in light of our ruling. First, we reverse the trial court's grant of summary judgment in favor of all Defendants as to Plaintiffs' negligence claims. "Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb. v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983). We cannot review or resolve the issue of the various Defendants' degree of involvement in modifying

the sprinkler system from our record on appeal. This is an issue for the trial court which the trial court may be able to resolve upon motion for directed verdict.

[2] Also, the trial court denied Plaintiffs' motion to amend their complaint to add E. Greene as a party defendant as a consequence of its order granting summary judgment in Defendants' favor. Because we reverse the trial court's order granting summary judgment as to Defendants, it follows the trial court should resolve and reconsider Plaintiffs' motion to add E. Greene as add a defendant to this action.

[3] As to Defendants' counterclaims against Plaintiffs, Defendants' brief summarily addresses this issue as follows:

> Without diminishing the strength of Defendants' argument that the Exculpatory Clause is valid and enforceable and bars Plaintiffs' claims, Defendants, in the alternative, ask the Court to apply the Exculpatory Clause equally to both parties; and if the summary judgment in favor of Defendants is reversed, the Court should reverse the dismissal of the counterclaims."

Defendants fail to cite any legal authority or otherwise argue this issue.

Under our Rules of Appellate Procedure, "[t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C. R. App. P. 28(a) (2017). "It is not the duty of this Court to supplement [a party's] brief with legal authority or arguments not contained therein." *Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) (quoting *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005)). "Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a) (2017).

Here, Defendants fail to argue this issue and do not present this Court with a reason to disturb the trial court's order granting summary judgment in favor of Plaintiffs as to Defendants' counterclaims. Defendants have abandoned this issue on appeal, and we consequently affirm the trial court's ruling as to Defendants' counterclaims.

[4] Finally, the trial court denied Plaintiffs' motion to continue and to enlarge discovery deadlines because the trial court found "no plausible reasons why further discovery would shed any light on paragraph 5(b) in the Lease." However, because this Court disagrees with the trial court's

interpretation of Paragraph 5(b), the trial court should, on remand, consider setting a new discovery schedule pursuant to Rule 26 to allow the parties to complete their discovery.

Based on the foregoing, we reverse the trial court's order of summary judgment and remand this action with instructions for the trial court to proceed consistently with this opinion.

REVERSED AND REMANDED.

Judge CALABRIA concur.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent from the majority's opinion reversing the trial court's order and remanding for further proceedings. The trial court properly granted summary judgment in favor of Defendants as Paragraph 5(b) (the "Exculpatory Clause") of the lease is unambiguous and operates as a complete defense to the claims raised by Plaintiffs.

"[W]hen the language of a contract is plain and unambiguous, construction of the language is a matter of law for the court." *Mountain Fed. Land Bank v. First Union Nat. Bank*, 98 N.C. App. 195, 200, 390 S.E.2d 679, 682 (1990) (citation omitted). "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948) (citation omitted). "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965) (citation omitted). Therefore, this Court construes the parties' contractual intent from the time of the writing as preserved in the contract and their actions. *See Mountain Fed. Land Bank*, 98 N.C. App. at 200, 390 S.E.2d at 682.

There is no question that leases

> which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed; any clause in a lease attempting to do so must show that this is the intent of the parties by clear and explicit language.

Lexington Ins. Co. v. Tires Into Recycled Energy & Supplies, Inc., 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (citation omitted).

In *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953), the defendant contended it was relieved of liability for negligence pursuant to the terms of a commercial real estate lease with the plaintiff that provided, in relevant part:

> [Paragraph 3]: The lessees . . . shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire or other casualty, as set forth in Paragraph Six hereof.
>
> [Paragraph 6]: The lessors agree to keep said theater buildings, and the equipment hereby leased, insured to the extent of its full insurable value in some reliable insurance company. In event the premises or property hereby leased shall at any time during the operation and continuance of this lease be damaged or destroyed by fire or other casualty, the lessors shall thereupon and forthwith repair and restore said premises and property to the same condition in which they were before the happening of such fire or other casualty.

Id. at 592, 79 S.E.2d at 188 (internal quotation marks omitted).[1] Our Supreme Court held this language was insufficient to shield defendant from liability for damage caused by its own negligence. *Id.* at 598, 79 S.E.2d at 192. The Court noted, "[i]f the parties intended such a contract, we would expect them to so state in exact terms." *Id.* at 596, 79 S.E.2d at 191.

Similarly, as the majority here correctly states, this Court found no such clear, explicit waiver of liability for negligence in *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988). The lease at issue in *Freeman* contained the following relevant language:

> INSURANCE: The Lessor shall carry, pay the premium, and be responsible for fire and extended coverage insurance upon the premises. In the event any improvements or

1. The lease provisions were listed in the facts section found prior to the opinion. The opinion did not fully cite the provisions, but referenced the paragraph numbers and summarized the provisions.

> alterations are made by the Lessee as provided hereinafter, the amount of such insurance shall be increased, following receipt, by Lessor, of written notice from Lessee, to such an extent as to cover said improvements and alterations. Unless the additional insurance coverage is increased to cover any improvements and alterations as aforesaid, the Lessor shall not be responsible for the replacement or restoration in the event of other casualty.
>
> The Lessee shall carry, pay the premiums, and be responsible for fire insurance and other insurance upon its property, contents and equipment and shall carry adequate and sufficient liability insurance for both the Lessee and Lessor and shall furnish the Lessor evidence of such coverage.
>
> The Lessee will not do, suffer or permit anything to be done in or about the premises that will affect, impair or contravene any policies of insurance against the loss or damage by fire, casualty or otherwise that may be placed thereon by the Lessee or the Lessor.
>
> All insurance policies shall be in the name of the Lessor and Lessee as their interests may appear. All insurance, whether carried by the Lessor or the Lessee, shall provide a waiver of subrogation against the other party[.]

Id. at 75, 365 S.E.2d at 185 (internal quotation marks omitted). This Court stated that the lease terms "contain[ed] no clear, explicit words waiving liability for negligence as required by *Winkler*." *Id.* at 76, 365 S.E.2d at 185.

However, this Court previously enforced a commercial real estate lease which included a broad exculpatory clause to prevent substantial damages. *See Hyatt v. Mini Storage on the Green*, 236 N.C. App. 278, 763 S.E.2d 166 (2014) (enforcing an exculpatory clause that protected against "any personal injuries" sustained on landlord's premises).[2] In *Hyatt*, the contractual language read as such:

> Landlord shall not be liable to tenant and/or tenant[']s guest or invitees for any personal injuries sustained by

2. Commercial lessors are justified in including exculpatory clauses because "water damage to merchandise may run to substantial amounts. For this reason[,] landlords tend to include the broadest exculpatory clause that will be enforced." Milton R. Friedman, Friedman on Leases 1181 (4th ed. 1997).

> tenant and/or tenant[']s guest or invitees while on or about landlord's premises.

Id. at 282, 763 S.E.2d 169 (brackets omitted). This Court found this language constituted an exculpatory clause which "clearly and explicitly provides that [defendant] would not be liable for personal injuries sustained on the premises." *Id.* at 282-83, 763 S.E.2d at 170.

Further, in *Lexington*, this Court enforced a clause requiring the lessee to maintain insurance and waiving their rights to recovery. *Lexington*, 136 N.C. App at 227, 522 S.E.2d at 801. In *Lexington*, the subrogation agreement stated:

> 18. Waiver of Subrogation. Each party, notwithstanding any provision of this Lease otherwise permitting such recovery, *hereby waives any rights of recovery against the other for loss or injury against which such party is protected by insurance*, to the extent of the coverage provided by such insurance. Each insurance policy carried by either party with respect to the Leased Premises or the property of which they are a part which insures the interest of one party only, shall include provisions denying to the insurer acquisition by subrogation of any rights of recovery against the other party. The other party agrees to pay any additional resulting premium.

Id. at 223-24, 522 S.E.2d at 799 (emphasis added). This Court found the subrogation clause "plain and unambiguous" as both parties "agreed to include a subrogation waiver clause in any insurance policies . . . which covered the leased premises." *Id.* at 226-27, 522 S.E.2d at 801.

Conversely, in *Winkler*, the parties lacked contractual intent while the lease lacked a subrogation clause, and *Freeman* only required the parties to protect against damages to their own property. Commercial real estate leases which "clearly and explicitly evidence[] the intent of each of the parties to relieve the other from all liability for damages otherwise covered by insurance, including liability for negligence" are enforceable. *Lexington*, 136 N.C. App at 227, 522 S.E.2d at 801.

In the case *sub judice*, the parties clearly and explicitly waived all claims, including claims for negligence. The relevant portion of the Exculpatory Clause reads:

> [N]otwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other *from all*

> *claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises*, or covered by insurance in connection with the property owned or activities conducted on the leased premises, *regardless of the cause of the damage or loss* . . . .

(Emphasis added).

The Exculpatory Clause shields Defendants from liability for "all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises . . . regardless of the cause of the damage or loss." Similar to *Lexington*, the Exculpatory Clause clearly and explicitly operates as a waiver of negligence for any liability on the leased premises.

Additionally, Paragraph 8 of the lease required Plaintiffs to possess both property and liability insurance in clear and unambiguous terms. *Cf. New River Crushed Stone, Inc. v. Austin Powder Co.*, 24 N.C. App. 285, 210 S.E.2d 285 (1974) (validating an indemnification clause where the contract (1) involved private parties, (2) did not violate public policy, and (3) did not result from any gross inequality in bargaining power).[3] Including an insurance requirement is evidence of the parties' intent to relieve the other from any liability or damages, including damages related to negligence.

It is not within this Court's discretion to redraft a private commercial real estate lease that is not contrary to public policy. Because the clear and unambiguous language of this commercial lease precludes recovery by Plaintiffs, I would affirm the trial court's entry of summary judgment.

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3. It is in the best interest of the tenant to seek insurance because "the likelihood of getting [a broad exculpatory clause] changed is slight. In these circumstances[,] the tenant should be protected by *adequate insurance*." Milton R. Friedman, Friedman on Leases 1181 (4th ed. 1997) (emphasis added).

NCJS, LLC AND JAMES H. PLYLER, PETITIONERS
v.
CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, RESPONDENT

No. COA16-1096

Filed 15 August 2017

1. Zoning—zoning ordinance—dumpster screening requirement—standards of review—appellate record—meaningful review

Although the superior court erred in a zoning case by failing to identify and apply the proper standards of review to each issue separately, the Court of Appeals elected not to remand the case where the appellate record permitted a meaningfully review of the dispositive issue of whether the City Board's interpretation and application of a zoning ordinance, posing a dumpster screening requirement, warranted reversal of its ultimate decision.

2. Zoning—zoning ordinance—dumpster screening requirement—nonconforming structures—land activity

The superior court and a City Board erred in a zoning case by concluding petitioner company's unscreened dumpsters on industrially zoned property were nonconforming structures subject to the nonconformance provisions of a zoning ordinance without determining whether petitioner's land activity triggered application of Section 12.303 of the ordinance's dumpster-screening requirement.

Appeal by petitioners from order entered 5 April 2016 by Judge Hugh Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 May 2017.

The Odom Firm, PLLC, by David W. Murray; and James H. Plyler, pro se, for petitioner-appellants.

Senior Assistant City Attorney Thomas E. Powers III and Senior Assistant City Attorney Terrie Hagler-Gray, for respondent-appellee.

ELMORE, Judge.

This is a zoning case about screening dumpsters. Petitioners NCJS, LLC and James H. Plyer (collectively "NCJS") own industrially zoned property in Charlotte. On the property sits a warehouse constructed in

1970 that is divided into six leasable units. Currently abutting the warehouse are two leaseholder-owned dumpsters unscreened from public view. A 1984 amendment to the Charlotte Zoning Ordinance (CZO) required that dumpsters be screened on three sides by a fence. Section 12.303 of the CZO, which imposes the dumpster-screening requirement, provides that "the provision of this Section must be met at the time that land is developed or land and structures are redeveloped."

After NCJS received a zoning notice of violation (NOV) for failing to screen its dumpsters, it appealed to the City of Charlotte's zoning board of adjustment ("City Board") (respondent), arguing that its property was neither developed nor redeveloped since enactment of the 1984 dumpster-screening amendment as required to trigger its application. After a hearing, the City Board voted three to two to affirm the zoning administrator's decision and issued a written order demanding that NCJS screen its dumpsters. In its decision, the City Board determined that NCJS's dumpsters were legally nonconforming structures under the CZO because they were unscreened and thus subject to the nonconformance provisions regulating nonconforming structures, which provides a nonconforming structure loses its nonconforming status when moved. Based on photographs of NCJS's property that showed the dumpsters had moved to different locations against the warehouse, the City Board concluded its dumpsters lost their legal nonconformity and need to be screened. NCJS petitioned the superior court for certiorari review, challenging the City Board's decision on several grounds. After a hearing, the superior court entered an order affirming the City Board's decision. NCJS appealed.

On appeal, NCJS alleges several errors arising from the superior court's order and the City Board's decision. The dispositive issue, however, is whether the City Board misinterpreted and misapplied the CZO, such that its decision should be reversed. Because we hold the City Board misinterpreted the CZO by concluding that NCJS's dumpsters were "nonconforming structures" without determining whether Section 12.303's dumpster-screening requirement was triggered, and thus misapplied the CZO by subjecting NCJS's dumpsters to the regulations governing nonconforming structures, which provides for the termination of a legal nonconformity when a nonconforming structure is moved, we reverse the superior court's order affirming the City Board's decision. Additionally, because the local zoning authority failed to satisfy its burden of proving the existence of a current zoning violation, we remand this case to the superior court for further remand to the City Board with the instruction to rescind the NOV issued against NCJS. In light of our disposition, we decline to address NCJS's remaining arguments.

I. Background

In 2006, NCJS purchased property located at 130 Stetson Drive in Charlotte, which is currently zoned as an I-1 industrial district. When NCJS's property was developed in 1970, it was subject to Mecklenburg County's zoning ordinance, which contained no dumpster-screening requirement. Sometime after 1970, the property came under the zoning jurisdiction of the City of Charlotte and subject to the CZO, which adopted screening requirements in 1972. In 1984, the City of Charlotte amended the CZO to specifically include dumpsters among the listed items requiring screening. Section 12.303 imposes the challenged dumpster-screening requirement and provides: "The provisions of this Section must be met at the time that land is developed or land and structures are redeveloped."

On 4 February 2015, a zoning administrator sent NCJS a letter, the zoning NOV, stating that it was violating the CZO because its dumpsters were unscreened. NCJS appealed to the City Board, which heard the matter on 31 March 2015. At the hearing, the zoning administrator argued that when the CZO's screening provision was amended in 1984 to include dumpsters, all unscreened dumpsters became "nonconforming structures" under CZO § 2.201 and thus were subject to the nonconformance provisions of CZO § 7.103 (regulating nonconforming structures), which provides for the termination of a legal nonconformity when a nonconforming structure is moved. The zoning administrator showed photographs of NCJS's property that revealed the following: in 2007, two dumpsters abutted the warehouse; in 2010, one dumpster had been removed from the property; in 2011, the remaining dumpster had been moved from one side of a garage entrance to the other; and in 2014, another dumpster had been added against the warehouse. Thus, the zoning administrator argued, because NCJS's dumpsters were nonconforming structures and had been moved, they lost their legal nonconformity and must now be screened.

NCJS argued that its property was grandfathered in from CZO § 12.303's dumpster-screening requirement because its property was developed in 1970, and neither its land nor its structures had been redeveloped. Thus, NCJS argued, because CZO § 12.303 contemplates dumpster-screening compliance when "land is developed or land and structures are redeveloped," neither of which occurred on its property since the 1984 amendment, Section 12.303's dumpster-screening requirement did not apply to its property.

After the hearing was closed, one member of the City Board moved to uphold the zoning NOV, but it was not seconded. After further deliberation among members of the City Board, the hearing was reopened. After the hearing was closed for the second time, the City Board voted three to two to affirm the determination that NCJS's dumpsters needed to be screened. Following the hearing, the City Board issued a written order affirming the zoning administrator's decision to issue NCJS a zoning NOV and demanding that NCJS screen its dumpsters. In its decision, the City Board agreed with the zoning administrator's interpretation that all dumpsters existing after enactment of the 1984 dumpster-screening amendment were nonconforming structures subject to the nonconformance provisions regulating nonconforming structures. Thus, the City Board found, NCJS's dumpsters lost their legal nonconformity when they were moved and must now be screened in compliance with the CZO.

On 18 May 2015, NCJS petitioned the Mecklenburg County Superior Court for certiorari review of the City Board's decision. After a 24 February 2016 hearing, the superior court entered an order on 5 May 2016 affirming the City Board's decision. NCJS appeals from the superior court's order.

II. Analysis

On appeal, NCJS contends the trial court erred by (1) failing to reference any of the grounds alleged in its petition for certiorari review, failing to identify which review standard it applied to any ground raised and the application of that review, failing to make any findings or conclusions related to whether the City Board's interpretation of the CZO was correct; and (2) finding facts beyond those found by the City Board to justify the City Board's decision. NCJS also asserts (3) the City Board misinterpreted the CZO by concluding its unscreened dumpsters were nonconforming structures because its dumpsters are "permitted accessory uses or structures" under the CZO and neither triggering event occurred that would subject its property to Section 12.303's dumpster-screening requirement. NCJS asserts further that (4) the City Board misapplied its ordinance by subjecting the dumpsters to the nonconformance provisions regulating "nonconforming structures," which prohibits movement, rather than "nonconforming accessory uses and structures," which does not. Finally, NCJS asserts (5) the City Board's decision was not based on sufficient evidence and was arbitrary and capricious. Because we conclude that NCJS's third alleged error is dispositive and warrants reversal of the City Board's decision, we decline to address its remaining arguments.

A. Standard of Review

We review a superior court's certiorari review of a municipal zoning board's quasi-judicial decision to determine whether the superior court: (1) " 'exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly.' " *CRLP Durham, LP v. Durham City/Cnty. Bd. of Adjustment*, 210 N.C. App. 203, 207, 706 S.E.2d 317, 320 (2011) (brackets omitted) (quoting *Union County Zoning Bd. of Adjustment*, 185 N.C. App. 582, 587, 649 S.E.2d 458, 464 (2007)).

On certiorari review, " 'the superior court sits as an appellate court, and not as a trier of facts,' " *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010) (quoting *Overton v. Camden Cnty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002)), and its scope of review is limited to the following:

> "(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious."

Cary Creek Ltd. v. Town of Cary, 207 N.C. App. 339, 341–42, 700 S.E.2d 80, 82–83 (2010) (quoting *Wright v. Town of Matthews*, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006)).

Generally, the petitioner's asserted errors dictate the scope of judicial review. " 'If a petitioner contends the Board's decision was based on an error of law, '*de novo*' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test.' " *Four Seasons Mgmt. Servs. Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) (quoting *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28, *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000)).

[1] In its petition for certiorari review to the superior court, NCJS contended the City Board's decision:

> (1) was in violation of the Petitioners' due process rights, (2) was in excess of the statutory authority conferred upon the

> City or the authority conferred upon the [City Board] by the City Ordinance, (3) was inconsistent with applicable procedures specified by statute or City Ordinance, (4) was erroneous as a matter of law, (5) was unsupported by substantial competent evidence in view of the entire record, and (6) was arbitrary and capricious.

" '[A] court may properly employ both standards of review in a specific case.' " *Thompson v. Town of White Lake*, ___ N.C. App. ___, ___, 797 S.E.2d 346, 351 (2017) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002)). " 'However, the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues[.]' " *Id.* (quoting *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18). To secure meaningful appellate review, " 'the trial court . . . must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.' " *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (brackets omitted) (quoting *Sun Suites Holdings*, 139 N.C. App. at 272, 533 S.E.2d at 528).

Here, the superior court's order provides that it "conducted a *de novo* review concerning questions of law and a 'whole record' test concerning the adequacy of the evidence,' " without identifying which review standard it applied to which issue, and, rather than actually addressing in its order any issue raised in NCJS's petition, the superior court made an additional finding beyond that found by the City Board to support the City Board's decision, and then "concluded as a matter of Law that the Decision Letter was proper and correct and should be affirmed."

Although the superior court's order here was inadequate, "[r]emand is not automatic when 'an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s).' " *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 158, 712 S.E.2d 868, 872 (2011) (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 664, 599 S.E.2d 888, 898 (2004)). "Under such circumstances the appellate court can 'determine how the trial court *should have* decided the case upon application of the appropriate standards of review.' " *Id.* at 158–59, 712 S.E.2d at 872 (brackets omitted) (quoting *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898). Because the appellate record permits us to meaningfully review the dispositive issue in this appeal—whether the City Board's interpretation and application of the CZO warrants reversal of its ultimate decision—we elect not to remand this case to the superior court to identify and apply the proper review standard to each issue raised in

NCJS's petition. *See Morris Commc'ns*, 365 N.C. at 159, 712 S.E.2d at 872–73 (electing not to remand where Court could " 'reasonably determine from the record' whether [the landowner's] challenge to the [Board of Adjustment's] interpretation 'warrant[s] reversal or modification' of the [Board of Adjustment's] ultimate decision").

B. Dumpster-Screening Trigger

[2] NCJS contends the City Board misinterpreted the CZO by concluding its unscreened dumpsters were "nonconforming structures" because its dumpsters were legally conforming absent a determination that Section 12.303's dumpster-screening requirement was triggered as to its property. We agree.

" 'Questions involving the interpretation of ordinances are questions of law,' and in reviewing the trial court's review of the Board of Adjustment's decision, this Court applies a *de novo* standard and may freely substitute its judgment for that of the trial court." *Fehrenbacher v. Cty. of Durham*, 239 N.C. App. 141, 150, 768 S.E.2d 186, 193 (2015) (quoting *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 530–31, 439 S.E.2d 199, 201, *disc. rev. denied*, 336 N.C. 71, 445 S.E.2d 28 (1994)). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *See Morris Commc'ns*, 365 N.C. at 156, 712 S.E.2d at 871 (citing *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17).

"The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Four Seasons Mgmt. Servs.*, 205 N.C. App. at 76–77, 695 S.E.2d at 463 (quoting *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965)).

> Statutory interpretation properly begins with an examination of the plain words of the statute. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, [w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. Therefore, a statute clear on its face must be enforced as written.

Lanvale Props., LLC v. Cnty. of Cabarrus, 366 N.C. 142, 154, 731 S.E.2d 800, 809–10 (2012) (internal citations omitted) (internal quotation marks omitted).

To support its decision to uphold the zoning NOV issued against NCJS, the City Board made the following relevant findings and conclusions:

> 3. The site is zoned I-2 (general industrial).
>
> . . . .
>
> 5. The applicant is appealing the Zoning Administrator's interpretation that dumpsters located on the subject site must be screened on three sides from public view.
>
> . . . .
>
> 8. Per Section 9.1104(3) of the Zoning Ordinance, dumpsters are permitted accessory structures within industrial zoning districts.
>
> 9. Per Section [12].403(1) of the Zoning Ordinance, dumpsters must be screened from the public view from public streets.
>
> 10. The Zoning Ordinance in effect at the time the subject property was developed in 1970 . . . . did not specifically indicate that dumpsters must be screened from the public view from public streets.
>
> 11. A dumpster that lawfully existed on the effective date of when dumpsters were required to be screened from public view by the Zoning Ordinance (i.e. early 1980's) and does not comply with these regulations, are considered to be a nonconforming structure as defined by Section 2.201 of the Zoning Ordinance.
>
> 12. Per Section 7.103(6) of the Zoning Ordinance, a nonconforming structure shall not be moved unless it thereafter conforms to the standards of the zoning district in which it is located.
>
> 13. Based on aerials, the location of dumpsters have moved and the number of dumpsters have changed on the subject site following the effective date of when dumpsters were required to be screened from public view by the Zoning Ordinance (i.e. early 1980's). Therefore, any dumpster on the subject site must conform to the current screening standards of the Zoning Ordinance.

> 14. Dumpsters, as nonconforming structures, lost their legal non-conformity when the dumpsters were moved and then moved again on the property.

NCJS specifically contends the City Board misinterpreted and misapplied the CZO by concluding (1) its "dumpsters were legally nonconforming" under Section 2.201, which (2) "lost their legal non-conformity by being moved" under Section 7.103(6).

The CZO defines a "nonconforming structure" as "[a]ny structure lawfully existing on the effective date of these regulations . . . which does not comply with these regulations or any amendment thereto." CZO § 2.201. Section 9.1104 provides that "dumpsters" are permitted "accessory uses or structures" on industrially zoned property "subject to the regulations of Section 12.403." CZO § 9.1104. Section 12.403 provides that dumpsters "shall be screened on three sides by a fence . . . in accordance with Section 12.303." CZO § 12.403. Section 12.303, which imposes the dumpster-screening requirement, provides that "[t]he provisions of this Section must be met at the time that land is developed or land and structures are redeveloped." CZO § 12.303.

The plain language of Section 12.303 indicates that its dumpster-screening requirement does not trigger unless "land is developed or land and structures are redeveloped." Thus NCJS's unscreened dumpsters could not fit Section 2.201's definition of a "nonconforming structure" unless Section 12.303's triggers have activated. Although the conditions precedent to trigger application of Section 12.303 are not ambiguous, this Court would interpret any doubts as to the applicability of a zoning regulation in favor of the landowner. *See, e.g.*, *In re W.P. Rose Builders' Supply Co.*, 202 N.C. 496, 500, 163 S.E. 462, 464 (1932) ("Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner."). Accordingly, we hold that the proper interpretation of the CZO required the City Board to determine, as a condition precedent to concluding that NCJS's unscreened dumpsters were nonconforming, that NCJS's "land [was] developed or land and structures [were] redeveloped" after enactment of the 1984 dumpster-screening amendment.

A local governmental authority bears the burden of proving the existence of a current zoning violation. *See Shearl v. Town of Highlands*, 236 N.C. App. 113, 116–17, 762 S.E.2d 877, 881 (2014) ("[T]he burden of proving the existence of an operation in violation of the local zoning ordinance is on Respondent." (citing *Cty. of Winston-Salem v. Hoots*

Concrete Co., 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980)). Here, the zoning officer failed to assert that any activity on NCJS's property triggered application of Section 12.303's dumpster-screening requirement, and the City Board neither considered nor found whether a Section 12.303 trigger occurred that would bring NCJS's dumpsters out of compliance with the CZO. Rather, the City Board found that "the subject property was developed in 1970," made no findings addressing redevelopment, and implicitly concluded that all unscreened dumpsters were nonconforming structures that could lose their nonconformity when moved.

Because NCJS's dumpsters were permitted accessory uses or structures in its district and did not fail to comply with the CZO until Section 12.303's dumpster-screening requirement was triggered, its dumpsters fell outside Section 2.201's definition of a "nonconforming structure," and thus should not have been subject to Section 7.104's nonconformance provisions regulating nonconforming structures. Accordingly, we hold the City Board and the superior court misinterpreted and misapplied the CZO by concluding NCJS's dumpsters were nonconforming and subject to the nonconformance provisions regulating nonconforming structures without determining whether NCJS's land activity triggered application of Section 12.303's dumpster-screening requirement.

"Because [the Board of Adjustment's] interpretation of its [zoning] ordinance constituted an error of law, we reverse." *See Morris Commc'ns*, 365 N.C. at 162, 712 S.E.2d at 874 (reversing board's decision ordering landowner to remove relocated sign because board misinterpreted the term "work" as applied to sign permit's requirement landowner commence work on relocating sign within a certain timeframe). Since the local zoning authority failed to prove the existence of a current zoning violation, we conclude the appropriate remedy is to remand this case to the superior court for further remand to the City Board with instructions to rescind the 4 February 2015 zoning NOV issued against NCJS. In light of our disposition, we decline to address NCJS's remaining arguments.

III. Conclusion

The City Board and the superior court misinterpreted and misapplied the zoning ordinance by concluding that NCJS's unscreened dumpsters were "nonconforming structures" subject to the regulations governing nonconforming structures absent any determination of whether NCJS's property activity since 1984 triggered application of Section 12.303's dumpster-screening requirement. Accordingly, we reverse the superior

court's order. Because the local zoning authority failed to prove the existence of a zoning violation, we remand this case to the superior court for further remand to the City Board to rescind the 4 February 2015 zoning NOV issued against NCJS.

REVERSED AND REMANDED.

Judges INMAN and BERGER concur.

THOMAS RIDER AND LINDA RIDER, PLAINTIFFS
v.
EDWIN HODGES D/B/A HODGES LAWN AND LANDSCAPE, DEFENDANT

No. COA17-110

Filed 15 August 2017

1. Contracts—breach of contract—landscaping—uncertain and indefinite arrangement—no meeting of minds—summary judgment

The trial court did not err by granting summary judgment in favor of defendant landscaper on a breach of contract claim for landscaping services where no contract was ever formed between the parties based on an uncertain and indefinite arrangement as to the price or scope of work to be completed on plaintiffs' property, and no meeting of the minds occurred. Further, plaintiff husband's affidavit contradicting his sworn deposition testimony was not considered.

2. Fraud—particularity—summary judgment—invoice—alleged promises

The trial court did not err by granting summary judgment in favor of defendant landscaper on a fraud claim for landscaping services where plaintiffs failed to allege a proper fraud claim under North Carolina law with particularity regarding both an invoice and alleged promises as required by N.C.G.S. § 1A-1, Rule 9(b).

3. Unfair Trade Practices—unfair and deceptive trade practices—landscaping—no contract for aggravating circumstances—invoicing—no proximate injury

The trial court did not err by granting summary judgment in favor of defendant landscaper on an unfair and deceptive trade

practices claim under N.C.G.S § 75-1.1(a) for landscaping services where there was no contract between the parties to back up plaintiffs' claim of aggravating circumstances and any alleged acts regarding the invoicing did not cause proximate injury.

Appeal by plaintiffs from an order granting summary judgment in favor of defendant entered 17 November 2016 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 7 June 2017.

James W. Lee III, for the plaintiffs-appellants.

Northup McConnell & Sizemore, PLLC, by Robert E. Allen, for defendant-appellee.

MURPHY, Judge.

Thomas Rider ("Thomas") and Linda Rider ("Linda") (collectively "the Riders") appeal from the trial court's decision granting Edwin Hodges d/b/a Hodges Lawn and Landscape's ("Hodges") motion for summary judgment as to the Riders' causes of action for: (1) breach of contract; (2) fraudulent billing; and (3) violation of the Unfair and Deceptive Trade Practices Act ("UDTPA"). The Riders argue that the trial court erred in granting the motion for summary judgment because genuine issues of material fact exist as to whether: (1) Hodges breached a valid contract; (2) Hodges committed fraudulent billing; and (3) Hodges engaged in unfair and deceptive trade practices. After careful review, we affirm the trial court's grant of Hodges' motion for summary judgment.

Background

In early July 2011, the Riders moved to the Oleta Falls area of Hendersonville, North Carolina. At some point prior to their move,[1] the parties arranged for Hodges to landscape the Riders' property.[2] The Riders paid Hodges $24,000 upfront "[t]o do landscaping," in two separate payments — $4,000 on 3 February 2011, and $20,000 on 4 March 2011. In June of 2012, Hodges felt that his landscaping services were

1. Neither party was able to recall a specific date, but both parties agree it was between late 2010 and early 2011.

2. Hodges is independently contracted by the Oleta Falls Property Owners' Association ("Oleta Falls POA") to upkeep the common areas of the community. He has also completed private landscaping jobs for thirty-three Oleta Falls residents.

completed and he ceased working on the Riders' property. Thomas claims that there were numerous issues with the landscaping. However, the Riders never complained about Hodges' work until 2015 when they filed this lawsuit.

Thomas contends that the Riders consistently asked Hodges for receipts or other documentation of his work expenditures throughout the landscaping process. However, the only documented request for Hodges' receipts occurred by email on 13 October 2013. Two or three days after this request, Hodges provided the Riders with an invoice ("the Invoice"). This was at least two years after the Riders claim the parties first entered into an arrangement. Both parties agree that the Invoice was created for use in the Riders' lawsuit against First Citizens Bank.

Despite Thomas' contention, Hodges claimed that the Riders first asked him to provide receipts for his work in 2013, and in total the Riders only asked for receipts "two, maybe three [times] including the [13 October 2013] email." Hodges further claimed that he offered receipts each time the Riders wrote him a check, and again when he completed all of his work in 2012, but the Riders declined.

After the Riders filed this suit, both Thomas and Hodges were deposed on 23 June 2016 regarding their business dealings and the landscaping arrangement. In Thomas' deposition, he testified that Hodges agreed the cost of the landscaping "would be up to [$24,000.]" In the same deposition, Thomas agreed that "there was never any firm agreement with regard to price." However, in his 27 October 2016 affidavit, filed in opposition to Hodges' motion for summary judgment, Thomas claims that Hodges "agreed to perform the specified landscaping work for [$24,000]."

In contrast to Thomas' testimony, Hodges claimed in his deposition that he told the Riders it would cost between $26,000 and $28,000 to landscape their property. Hodges went on to explain that the Riders paid him $24,000 because that was what they could afford for landscaping, and that "[i]t was understood that we would landscape everything we could with all the plants we could until [the Riders] ran out of money."

In addition to Thomas' inconsistent sworn testimony regarding price, the depositions also demonstrate that the parties never reached an agreement as to the scope of the work Hodges was to complete. In his deposition, Thomas claimed that he and Hodges spoke about the landscaping including: a flagpole, irrigation, re-grading part of a hill on the property, fencing, and plants. Thomas went on to admit that there was no "specific agreement," as to plans for irrigation, how much fencing

would be built, how many or what type of plants would be provided, or how much mulch and top soil would be used. Thomas also admitted, "there was never a meeting of the minds," and that he and Hodges had "no specific agreement about anything."

The trial court entered an order granting summary judgment in Hodges' favor. The Riders filed a timely notice of appeal.

Analysis

The Riders argue on appeal that the trial court erred in granting Hodges' motion for summary judgment. We disagree and affirm the trial court's decision.

We review an order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is only appropriate when the record shows "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* at 524, 649 S.E.2d at 385 (quotation omitted).

I. Breach of Contract

[1] The Riders argue the trial court erred in granting summary judgment on their claim for breach of contract because Hodges did not perform all of the landscaping work for which the parties contracted. We disagree. No contract ever formed because the arrangement was not certain and definite as to the price or scope of the work to be completed, and no meeting of the minds occurred.

"A contract for service must be certain and definite as to the nature and *extent of the service to be performed*, the place where and the person to whom it is to be rendered, and *the compensation to be paid*, or it will not be enforced." *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E.2d 735, 737 (1921) (emphasis added). With regard to these essential terms "the parties must assent to the same thing in the same sense . . . . If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (internal quotation omitted). Similarly, "a valid contract exists only where there has been a meeting of the [parties'] minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (citation omitted).

The Riders' breach of contract argument fails for two reasons. First, while both parties acknowledge a landscaping arrangement existed,

there was never a meeting of the minds as to the scope of the work to be done. *See Croom*, 182 N.C. at 220, 108 S.E.2d at 737 (explaining that the extent of the services to be performed is an essential element of an enforceable contract for services). Here, Thomas' own testimony demonstrates the parties never specified the breadth of the work Hodges was to complete.

In his deposition, Thomas claims that after the Riders retained Hodges and paid him in full, Hodges "didn't agree to specifically do anything, just to get started on the landscape." Although certain topics such as irrigation were discussed, Thomas affirms that there was never a definitive meeting of the minds as to "any specific terms of the contract with regard to what work or materials [would] be performed [by Hodges.]" As a result, no meeting of the minds occurred regarding the extent of the services to be performed, which is essential for an enforceable contract for services to form.

Second, the Riders' claim that Hodges breached a contract also fails because the parties never reached a meeting of the minds with regard to the compensation Hodges was to be paid for his landscaping services. Compensation is an essential element to a contract for services. *Croom*, 182 N.C. at 220, 108 S.E.2d at 738. Here, there was no agreement as to price, and therefore there was no enforceable contract.

Thomas admits at numerous times that there was never a meeting of the minds with regard to price:

> Q. Now, what was your understanding or expectation as to what Mr. Hodges['] overhead profit would be on this job?
>
> [Thomas]: I had no idea what his overhead profit would be on the job. I -- in that same conversation I asked him, you know, I understand that you have to pick up the plants, and, you know, there's certain expenses involved in that, deliver them to the site. I don't have a problem with paying for any of that and your profit on doing those functions. But I'm going to need to know the price for a plant, what that overhead is including your pickup, delivery, profit, whatever is added into that and what the cost for planting is. Those were the three factors that I considered would go into supplying a landscape service.
>
> Q. Sounds like there was never any firm agreement with regard to price?
>
> . . .

> Q. Is that accurate?
>
> [Thomas]: Well, there never was because none was ever put forth. I mean, it's hard for me to make a pronouncement on the price of a plant when I don't know what a plant costs.
>
> Q. So I think you and Mr. Hodges never had agreement with regard to what the price of this landscaping work was going to be, is that accurate?
>
> . . .
>
> [Thomas]: We -- not a precise price, no.

While it is clear the Riders paid Hodges about $24,000 "[t]o do landscaping," Thomas also made clear that the parties were not sure how much they would ultimately pay Hodges:

> Q. . . . Do you recall why you paid him a specific amount of $24,000 as opposed to 26 or 29 or 20?
>
> [Thomas]: Because he said it would be *up to that* to do the landscaping on the property.

(Emphasis added).

The only time that the Riders claimed a definite price existed was Thomas' 27 October 2016 affidavit filed in opposition to Hodges' motion for summary judgment. In the affidavit, he claims Hodges "agreed to perform the specified landscaping work for $24,000.00[,]" contradicting his prior deposition. Although this affidavit alleges a price was agreed to, it does not create a genuine issue of material fact.

Even where the defendant's latest account of the underlying fact situation might, in other circumstances, be enough to defeat summary judgment "a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility[,]" and that "once [the movant] support[s] its summary judgment motion with the [nonmovant's] sworn testimony, [the nonmovant] can only defeat summary judgment on the issue of his intentional acts by producing evidence *other than his own affidavit or deposition contradicting his own testimony*." *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 211-12, 605 S.E.2d 180, 185 (2004).[3] If not

3. *Allstate* examined and clarified *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978), *aff'd per curiam by an equally*

for this rule, "a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony[,]" which would "greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9-10, 249 S.E.2d 727, 732 (1978), *aff'd per curiam by an equally divided court*, 297 N.C. 696, 256 S.E.2d 688 (1979) (citation omitted). Thus, as here, where a nonmovant relies solely on his own affidavit[4] that contradicts his prior deposition testimony to create a genuine issue of material fact, we decline to allow the affidavit to create a genuine issue that would otherwise defeat summary judgment.

Since Thomas' 27 October 2016 affidavit contradicts his sworn deposition testimony and was filed in response to a motion for summary judgment, we decline to consider it and hold that the parties never agreed upon price — an essential element of a contract. No contract existed for Hodges to breach and Hodges was entitled to judgment as a matter of law on the Riders' breach of contract claim.

II. Fraud

[2] The Riders argue the trial court erred in granting Hodges' motion for summary judgment on their fraud claim, arguing the material facts were in dispute as to whether they were induced to pay Hodges $24,000: (1) by the Invoice; and (2) by alleged fraudulent promises. We disagree and affirm the trial court's grant of summary judgment in favor of Hodges for this claim.

For the Riders' fraud claim to survive summary judgment, Hodges' conduct must satisfy all the elements of fraud: "(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party." *Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 388 (quotation omitted). "[A]ny reliance on the allegedly false representations must be reasonable." *Id.* at 527, 649 S.E.2d at 388 (citation omitted).

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divided court, 297 N.C. 696, 256 S.E.2d 688 (1979), where we held that a party cannot defeat a motion for summary judgment by creating an issue of fact by filing an affidavit in response to the motion that contradicts his prior sworn testimony. *Id.* at 9, 249 S.E.2d at 732.

4. Only Thomas submitted an affidavit in opposition to Hodges' motion for summary judgment. At no point did Linda verify the complaint, submit her own affidavit, or otherwise offer sworn testimony.

Under Rule 9(b) of the North Carolina Rules of Civil Procedure, "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Specifically, the particularity requirement for a fraud claim "is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). The Riders have failed to allege a proper fraud claim under North Carolina law with regard to both the Invoice and alleged promises for the reasons that follow.

A. Invoice

The Riders argue that the Invoice defrauded them because it contained intentionally inaccurate records of the labor and materials used on the property. We disagree, because the Invoice did not actually deceive the Riders, nor did they rely on it or face injury thereby. *See Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 388 (stating that the elements of a proper fraud claim include actual deception of the intended party and damage to the deceived party). Thomas testified that he immediately recognized the information on the Invoice was incorrect, and that the Invoice was created more than two years after the Riders paid Hodges. No later payments were made based upon the Invoice. Further, both parties agree the Invoice was generated for the Riders' use in another lawsuit, not for the purpose of billing the Riders for landscaping services.

These facts indicate that Hodges' conduct does not satisfy the fourth or fifth elements of a proper fraud claim — that it actually deceived the intended party and caused them damage. The Riders cannot claim they were deceived by the Invoice if Thomas recognized it was false upon receiving it. Finally, since the Riders were not induced to pay Hodges more than the $24,000 they had already given him, they cannot now claim that they were damaged by the Invoice's alleged inaccuracies. The Riders have not alleged facts that satisfy a fraud claim as it relates to the Invoice. Thus, summary judgment was proper as to this aspect of the Riders' fraud claim.

B. Alleged Promises

The Riders argue Hodges made promises that he never intended to fulfill to induce the Riders to pay him $24,000. The Riders' allegations of fraudulent promises fail as a matter of law.

The Riders claim Hodges induced them to enter into a contract by making fraudulent promises, stating in their complaint that Hodges "had

no intention to satisfy his obligations," and the Riders "did actually rely on [Hodges'] misrepresentation[s.]" The Riders do not detail any content of the allegedly fraudulent promises and have not met their pleading requirements under North Carolina Rule of Civil Procedure 9(b). *See Terry*, 302 N.C. at 85, 273 S.E.2d at 678 (specifying that all fraud claims must be pleaded with particularity). Therefore, summary judgment was proper as to this aspect of the Riders' fraud claim.

Since the Riders failed to allege a proper fraud claim regarding either the Invoice or alleged fraudulent promises, the trial court did not err in granting summary judgment for Hodges as to this issue.

III. Unfair and Deceptive Trade Practices

[3] The Riders argue they were injured by Hodges' use of unfair and deceptive trade practices in violation of N.C.G.S § 75-1.1(a) (2015). They claim Hodges violated the UDTPA by: (1) inducing them into a contract he intended to breach; and (2) fraudulently billing them with an inaccurate invoice.[5] We disagree and affirm the trial court's granting of summary judgment in favor of Hodges.

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" are unlawful. N.C.G.S. § 75-1.1(a). For a plaintiff to establish a prima facie claim of unfair and deceptive trade practices that will survive summary judgment, he "must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused injury to plaintiffs." *Walker v. Fleetwood Homes Of N. Carolina, Inc.*, 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (2007) (quotation and citation omitted). Whether an act violates N.C.G.S. § 75-1.1 is a question of law. *Id.* at 71, 653 S.E.2d at 399 (quotation omitted).

A. Intentional Breach of the Contract

The Riders first argue that summary judgment should not have been granted on the UDTPA claim because "Hodges fraudulently induced [them] into entering into the contract even though Hodges had no intention of honoring the contract." Breach of contract, even if intentional,

5. We consider no other potential arguments for the claim that Hodges' conduct violated the UDTPA because the Riders did not raise any. It is an appellant's responsibility to raise all relevant issues and arguments that they wish to be considered. Under North Carolina Rule of Appellate Procedure 28(6)(b), "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." Thus we decline to examine Hodges' business dealings with the Riders for unfair or deceptive trade practices beyond these two arguments.

can only create a basis for an unfair and deceptive trade practices claim if substantial aggravating circumstances attend the breach. *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003). Here, the Riders claim the aggravating circumstance is "Hodges' conduct in soliciting funds for labor and materials[,] which were never going to be provided[.]"

We decline to review whether Hodges' conduct qualifies as an aggravating circumstance attending a breach of contract because, as discussed in Section I, there was no contract for Hodges to breach because the agreement between Hodges and the Riders was not certain and definite as to the price or scope of the work to be completed, and no meeting of the minds occurred. Thus, as a matter of law, the act the Riders allege constituted an unfair or deceptive act or practice never occurred, as required to establish a prima facie claim for unfair and deceptive trade practices. *See e.g. Watson Elec. Constr. Co.*, 160 N.C. App. at 657, 587 S.E.2d at 95 (considering whether aggravating circumstances attended a breach of contract only after determining that a breach of contract occurred).

B. Fraudulent Billing

The Riders argue that if there was no contract, summary judgment still should not have been granted on the UDTPA claim because a finder of fact could find a violation of UDTPA based on the Riders' fraudulent billing claim. The complaint describes this cause of action as:

> 26. The foregoing and succeeding paragraphs are hereby incorporated by reference and realleged as if fully set forth herein.
>
> 27. The actions of the Defendant in providing landscaping services and entering into landscaping contracts are in or affecting commerce.
>
> 28. The Defendant procured the Contract with the Plaintiffs, demanded payment from the Plaintiffs, accepted the Plaintiffs' money, and submitted the fraudulent Invoice to the Plaintiffs with the intent to defraud the Plaintiffs, said actions constituting unfair and deceptive trade practices in violation of [N.C.G.S.] § 75-1.1 et seq.
>
> 29. The Defendant fraudulently represented to the Plaintiffs he would perform the services under the Contract and fraudulently represented to the Plaintiffs he had provided the labor and materials specified in the Invoice.

30. The Plaintiffs . . . were actually damaged thereby.

Based on this complaint, a prima facie case of unfair and deceptive trade practices beyond the breach of contract claim does not exist because the alleged acts did not proximately cause injury to the Riders.

To the extent the UDTPA claim is based on the Invoice, the submission thereof or representation that the labor and materials therein were provided caused no proximate injury to the Riders because the Invoice was not generated for over two years after the Riders submitted the last payment for landscaping, and it was indisputably created for the Riders to use in a different lawsuit. The Riders argue on appeal that a UDTPA claim can also be based on "false representations" made "to induce the payment of $24,000[ ]" or fraudulently billing against entrusted funds. However, these arguments were not addressed by the complaint and are made for the first time on appeal, and thus are not appropriate for us to now review. N.C. R. App. P. 10 ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.")

Neither of the Riders' allegations on the issue of unfair and deceptive trade practices sufficiently supports their claim that Hodges violated N.C.G.S § 75-1.1(a). The trial court did not err in granting summary judgment on this issue.

Conclusion

For the reasons stated above, we affirm the trial court's order granting summary judgment for Hodges on the claims for breach of contract, fraudulent billing, and unfair and deceptive trade practices.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ROY EUGENE BRYANT

No. COA16-1020

Filed 15 August 2017

1. Sentencing—prior record level—South Carolina conviction—criminal sexual conduct in the third degree—substantially similar to North Carolina offenses—second-degree forcible rape—second-degree forcible sexual offense

The trial court did not err in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level at VI based on its conclusion that defendant's prior South Carolina offense of criminal sexual conduct in the third degree was substantially similar to North Carolina's offenses of second-degree forcible rape and second-degree forcible sexual offense. Any violation of S.C. Code Ann. § 16-3-654 would also be a violation of either N.C.G.S. § 14-27.22 or § 14-27.27, and vice versa.

2. Sentencing—prior record level—South Carolina conviction—criminal sexual conduct with minors in the first degree—not substantially similar to North Carolina offenses—statutory rape of child by adult—statutory sexual offense with child by adult—harmless error

The trial court committed harmless error in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level VI based on its conclusion that defendant's 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree was substantially similar to North Carolina's offenses of statutory rape of a child by an adult under N.C.G.S. § 14-27.23 and statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28, where there were disparate age requirements. The error did not affect defendant's prior record level calculation.

Judge BERGER concurring in part and dissenting in part in separate opinion.

Appeal by defendant from judgments entered 29 February 2016 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert D. Croom, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for defendant-appellant.

CALABRIA, Judge.

Roy Eugene Bryant ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of second-degree sexual offense and second-degree rape. On appeal, defendant only challenges the sentence imposed by the trial court. Defendant contends that the court improperly calculated his prior record level, due to its erroneous conclusion that two of defendant's prior South Carolina convictions were substantially similar to certain North Carolina offenses. After careful review, we conclude that defendant received a fair trial, free from prejudicial error.

I. Background

The State presented evidence that in the evening of 17 October 2014, defendant was a stranger to the victim and her boyfriend when he joined them as they walked to their apartment in downtown Winston-Salem, North Carolina. Once the victim was alone, defendant engaged in sexual conduct with her by force and against her will. On 18 October 2014, officers with the Winston-Salem Police Department arrested defendant for second-degree sexual offense and second-degree rape. A Forsyth County grand jury indicted defendant for these offenses on 1 June 2015. Trial commenced in Forsyth County Criminal Superior Court on 22 February 2016. On 26 February 2016, the jury returned verdicts finding defendant guilty. The jury also found, as an aggravating factor, that defendant committed the offenses while on pretrial release on another charge.

Following the verdicts, the trial court excused the jury to begin sentencing proceedings. The State submitted a copy of defendant's Division of Criminal Information records regarding his prior convictions in North Carolina, South Carolina, and Florida. The State drafted a proposed prior record level worksheet, and defendant stipulated to its accuracy, "except for the class of any out-of-state conviction higher than a class I felony[.]"

In determining defendant's prior record level, the State argued that two of defendant's prior South Carolina convictions were substantially similar to certain North Carolina offenses. First, the State asserted that defendant's 1991 conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies

of second-degree forcible rape and second-degree forcible sex offense. Next, the State contended that defendant's 1996 conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class B1 felonies of statutory rape of a child by an adult and statutory sexual offense with a child by an adult. Although defendant disagreed with the State regarding substantial similarity, he stipulated that the 1991 and 1996 South Carolina convictions were both felony offenses.

After reviewing the relevant statutes from both jurisdictions, the trial court found that the State had proven by a preponderance of the evidence that the respective offenses were substantially similar. The court assigned defendant six points for his 1991 conviction and nine points for his 1996 conviction. *See* N.C. Gen. Stat. § 15A-1340.14(b)(1a)-(2) (2015) (instructing the trial court to assign a felony offender "6 points" "[f]or each prior felony Class B2, C, or D conviction" and "9 points" "[f]or each prior felony Class B1 conviction" that the court finds to have been proved).

Based on defendant's prior convictions, the trial court determined that he was a prior record level VI offender with 27 points. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) (providing that offenders with "[a]t least 18 points" are prior record level VI for felony sentencing purposes). Based on defendant's prior record level and the jury's finding of an aggravated factor, the trial court sentenced defendant to two consecutive terms of 182 to 279 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Analysis

On appeal, defendant contends that the trial court improperly sentenced him at prior record level VI, due to the court's erroneous conclusion that two of defendant's prior South Carolina convictions were substantially similar to North Carolina offenses. We disagree.

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80, *disc. review denied*, 367 N.C. 223, 747 S.E.2d 538 (2013). A defendant need not object to the calculation of his prior record level at sentencing in order to preserve the issue for appellate review. *Id.* at 178, 741 S.E.2d at 679; N.C. Gen. Stat. § 15A-1446(d)(5), (18).

A felony offender's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions"

that the trial court finds to have been proven at the sentencing hearing. N.C. Gen. Stat. § 15A-1340.14(a). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). The State may prove the defendant's prior convictions by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id.

Generally, felony convictions from jurisdictions outside of North Carolina are classified as Class I felonies and assigned two prior record points. N.C. Gen. Stat. § 15A-1340.14(e); N.C. Gen. Stat. § 15A-1340.14(b)(4). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). "[A] defendant may stipulate both that an out-of-state conviction exists and that the conviction is classified as a felony offense in the relevant jurisdiction." *Threadgill*, 227 N.C. App. at 179, 741 S.E.2d at 680.

Substantial similarity "is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014). "[F]or a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." Id. at 719, 766 S.E.2d at 333. "[A] printed copy of a statute of another state is admissible as evidence of the statut[ory] law of such state." *State v. Morgan*,

164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (remanding for resentencing where "[t]he State presented no evidence . . . that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which [the d]efendant was convicted").

A. Criminal Sexual Conduct in the Third Degree

[1] Defendant first contends that the trial court erred in determining that South Carolina's offense of criminal sexual conduct in the third degree is substantially similar to North Carolina's offenses of second-degree forcible rape and second-degree forcible sexual offense. We disagree.

At sentencing, defendant stipulated that on 19 November 1991, he was convicted in South Carolina of criminal sexual conduct in the third degree. The State presented the trial court with a copy of the 2014 version of the South Carolina statute,[1] which provides:

> (1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
>
> > (a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.
> >
> > (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.
>
> (2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than ten years, according to the discretion of the court.

S.C. Code Ann. § 16-3-654. The term "sexual battery" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital

1. As the State correctly observed at sentencing, in order to prove substantial similarity, the State was required to provide evidence of the South Carolina law that was in effect when defendant was convicted. *See Morgan*, 164 N.C. App. at 309, 595 S.E.2d at 812. However, the 2014 version that the State provided was sufficient due to its inclusion of statutory history demonstrating that the section has not been amended since its enactment in 1977.

or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).[2]

The State contended that South Carolina's offense of criminal sexual conduct in the third degree is substantially similar to North Carolina's offenses of (1) second-degree forcible rape and (2) second-degree forcible sexual offense. North Carolina's second-degree forcible rape statute provides, in pertinent part:

> (a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.
>
> (b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C. Gen. Stat. § 14-27.22(a)-(b). Second-degree forcible sexual offense has the same elements as second-degree forcible rape, except that "a sexual act" replaces "vaginal intercourse" as the underlying sexual conduct:

> (a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

---

2. The 2015 version of the definitional statute that the State provided to the trial court also included statutory history establishing that the section has not been amended since its passage in 1977.

> (b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C. Gen. Stat. § 14-27.27. "Sexual act" means "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C. Gen. Stat. § 14-27.20(4).

On appeal, defendant contends that "[a] violation of S.C. Code Ann. § 16-3-654 could be a violation of either N.C.G.S. § 14-27.22 or -27.27, but not both, because North Carolina's rape statute only applies to vaginal intercourse and its sexual offense statute specifically excludes vaginal intercourse." However, this seems to be a distinction without a difference. Second-degree forcible rape and second-degree forcible sexual offense have identical elements except for the underlying sexual conduct, and both offenses are Class C felonies in North Carolina. Furthermore, South Carolina's definition of "sexual battery" includes vaginal intercourse as well as all conduct constituting a "sexual act" in North Carolina. Accordingly, any violation of S.C. Code Ann. § 16-3-654 would also be a violation of either N.C. Gen. Stat. § 14-27.22 or § 14-27.27, and vice versa. Therefore, the trial court did not err in determining that these offenses are substantially similar. *See State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008), *appeal dismissed and disc. review denied*, 363 N.C. 661, 685 S.E.2d 799 (2009) ("[T]he requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' ").

B. Criminal Sexual Conduct with Minors in the First Degree

[2] We do not reach the same conclusion regarding defendant's 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree, which the trial court determined is substantially similar to North Carolina's offenses of statutory rape of a child by an adult, N.C. Gen. Stat. § 14-27.23, and statutory sexual offense with a child by an adult, N.C. Gen. Stat. § 14-27.28. We disagree.

A person commits the South Carolina offense of criminal sexual conduct with minors in the first degree "if the actor engages in sexual battery with the victim who is less than eleven years of age." S.C. Code Ann. § 16-3-655(1) (1996). In North Carolina, "[a] person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.23(a). "A person is guilty of statutory

sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.28(a). Both offenses are Class B1 felonies in North Carolina. N.C. Gen. Stat. §§ 14-27.23(b), -27.28(b).

Contrary to our previous determination, these offenses are not substantially similar due to their disparate age requirements. Although both of the North Carolina statutes require that the offender be "at least 18 years of age[,]" N.C. Gen. Stat. §§ 14-27.23(a), -27.28(a), a person of any age may violate South Carolina's statute. *See* S.C. Code Ann. § 16-3-651(a) (defining "actor" as "a person accused of criminal sexual conduct"). Moreover, North Carolina's statutes apply to victims "under the age of 13 years[,]" N.C. Gen. Stat. §§ 14-27.23(a), -27.28(a), while South Carolina's statute protects victims who are "less than eleven years of age." S.C. Code Ann. § 16-3-655(1). The North Carolina and South Carolina statutes thus apply to different offenders and different victims. Therefore, the offenses are not substantially similar. *See Sanders*, 367 N.C. at 719-20, 766 S.E.2d at 333-34 (holding that North Carolina's offense of assault on a female is not substantially similar to Tennessee's offense of domestic assault because, *inter alia*, the North Carolina offense "requires that (1) the assailant be male, (2) the assailant be at least eighteen years old, and (3) the victim of the assault be female[,]" while the Tennessee offense "does not require the victim to be female or the assailant to be male and of a certain age"). Accordingly, the trial court erred by assigning defendant nine points based on his 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree.

Nevertheless, we hold that the trial court's error was harmless. Defendant received 27 points for his prior convictions, which corresponds with a prior record level VI. Although the trial court erred by assigning defendant nine points for his 1996 South Carolina conviction, defendant stipulated that the offense was a felony. Assuming, *arguendo*, that the trial court had classified the offense as a Class I felony and assigned defendant two points on that basis, defendant would still have 20 total points. Since offenders with "[a]t least 18 points" are sentenced at prior record level VI pursuant to N.C. Gen. Stat. § 15A-1340.14(c)(6), the trial court's error did not affect defendant's prior record level calculation and was, therefore, harmless. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 382, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

Accordingly, we conclude that defendant received a fair trial, free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge HUNTER, JR. concurs.

Judge BERGER concurs in part and dissents in part in a separate opinion.

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

I concur with the majority opinion concerning the issue of substantial similarity of Defendant's South Carolina conviction for third degree sexual conduct with N.C. Gen. Stat. § 14-27.22 or N.C. Gen. Stat. § 14-27.27. However, because Defendant's South Carolina conviction for first degree sexual conduct with minors is substantially similar to N.C. Gen. Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28, I would affirm the trial court's conclusion as to this issue, and respectfully dissent.

An out-of-state felony conviction is generally classified as a Class I offense for structured sentencing purposes. N.C. Gen. Stat. § 15A-1340.14(e) (2015). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Section 15A-1340.14(e). This Court has stated that "the requirement set forth in N.C. Gen. Stat. § 15A–1340.14(e) is *not that the statutory wording precisely match*, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008) (emphasis added). There is no requirement that the statutes have to be identical.

The majority holds that "these offenses are not substantially similar due to their disparate age requirements[,]" citing *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014). However, the majority's focus on age would demand the offenses be identical for there to be substantial similarity.

The trial court correctly made the following findings and conclusions regarding Defendant's conviction for first degree sexual conduct with minors:

THE COURT: Okay. And I note that the defendant is contesting that it should be a B1. The defendant, like the [conviction for third degree sexual conduct], asserts it should be a class I felony. However, for the reasons stated by the State, the [c]ourt finds that the State has proven by a preponderance of the evidence, in reviewing State's Exhibit 58,[1] that that particular South Carolina conviction is substantially similar to 14-27.23, statutory rape of a child and 14-27.28, statutory sex offense with a child. For all the reasons mentioned by the State –

And I should note that State's Exhibit 57, for the South Carolina offense the punishment for that particular class C felony was not more than ten years. While the punishment is not, per se, the determinative factor, it is one factor to consider and that is consistent, depending on the person's prior record level, of what he could receive for a class C felony in North Carolina for the corresponding North Carolina crimes.

Similarly[,] State's Exhibit 58 shows that someone convicted for the first-degree criminal sexual conduct with a minor less than 11 years, the punishment is not more than 30 years. That is consistent, although not identical, it is consistent with someone, depending on the prior record level, that is convicted of a B1 felony in North Carolina for the corresponding North Carolina crimes.

Court also finds although the age of the victim in the South Carolina case differs somewhat from that in North Carolina, the goal of both statutes is to punish either sexual offenses -- well, either vaginal intercourse or sexual offenses with minors, and that's exactly what the North Carolina statute is designed to do as well. Again, the [c]ourt cites [*State v. Sapp*] in finding that the State has proven by a preponderance of the evidence that that particular conviction out of South Carolina is substantially similar to the two statu[t]es that I've cited for North

1. State's Exhibits 56, 57, and 58 were each related to Defendant's criminal history and convictions used on his prior record level worksheet. Exhibit 58 specifically included each of the North Carolina and South Carolina statutes utilized to determine whether Defendant's convictions were substantially similar.

> Carolina. The [c]ourt will assign the classification of that out-of-state conviction to be a B1 felony.
>
> . . . .
>
> And again, for . . . each out-of-state conviction on the prior record level worksheet, the [c]ourt finds by a preponderance of the evidence that the offense is substantially similar to the North Carolina offenses that I've already itemized for the record, and that the North Carolina classification assigned to those particular out-of-state convictions is correct. The [c]ourt also finds that the State and defendant have stipulated in open court to the prior conviction points and record level except as to the class of any out-of-state conviction higher than a class I felony. The [c]ourt has already made those findings. The [court] also now, based on State's Exhibit Numbers 56, 57 and 58, incorporates all those exhibits in support of the [c]ourt's findings.

Moreover, the statutes at issue are substantially similar because the elements of the statutes target the same assailants, offense, and victims – assailants of any gender who engage in vaginal intercourse or sexual offenses with children. In fact, all child-victims who meet the age requirement for the South Carolina offense of first degree sexual conduct with minors, i.e., children eleven years old and younger, would meet the age requirement and could be classified as victims under N.C. Gen Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28.

Defendant's South Carolina conviction for first degree sexual conduct with minors is substantially similar to N.C. Gen. Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28, and I would affirm the trial court's classification of that offense as a B1 felony.

STATE OF NORTH CAROLINA
v.
GUSS BOBBY CARTER, JR., DEFENDANT

No. COA16-854

Filed 15 August 2017

1. Evidence—lay opinion—visual identification—crack cocaine —chemical analysis

The trial court did not commit plain or prejudicial error in a drug case by allowing an agent's lay opinion testimony visually identifying a substance (crack cocaine) as a controlled substance where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance.

2. Constitutional Law—effective assistance of counsel—failure to object—lay opinion testimony—crack cocaine

Defendant did not receive ineffective assistance of counsel in a drug case based on trial counsel's failure to object to an agent's lay opinion testimony visually identifying a substance that fell from defendant as crack cocaine. There was a chemical analysis and related expert opinion that the substance had unique chemical properties consistent with the presence of cocaine and defendant failed to establish a reasonable probability that there would have been a different result absent the alleged error.

Appeal by Defendant from judgment entered 23 February 2016 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Mark Montgomery for Defendant-Appellant.

INMAN, Judge.

A trial court errs by allowing lay opinion testimony visually identifying a substance, crack cocaine, as a controlled substance. However, this error is not prejudicial when the State has presented expert testimony, based upon a scientifically valid chemical analysis, that the substance in question is a controlled substance.

Guss Bobby Carter ("Defendant") appeals from a judgment entered 23 February 2016 upon his convictions following a jury trial for possession of cocaine, possession of drug paraphernalia, possession of an open container of alcohol in the passenger area of a motor vehicle, and for attaining habitual felon status. Defendant argues that the trial court committed plain error by admitting the opinion testimony of an officer who visually identified a controlled substance. Defendant also argues he received ineffective assistance of counsel due to his trial counsel's failure to object to the testimony. After careful review, we hold that Defendant has failed to demonstrate prejudice necessary to prevail on either argument.

Factual and Procedural Background

The evidence at trial tended to show the following:

On 3 October 2014, Special Agent Chris Kluttz ("Agent Kluttz") of the North Carolina Department of Alcohol Law Enforcement ("ALE") pulled over a Ford Taurus traveling erratically on Interstate 85 after he spotted an open beer can in the passenger area. There were four individuals in the vehicle; Defendant was sitting in the front passenger seat. Upon smelling alcohol and seeing open containers, Agent Kluttz asked the driver to step out of the vehicle. Agent Kluttz searched the driver and found a glass pipe in his right front pants pocket, and placed the driver in handcuffs.

Agent Kluttz then proceeded back to the vehicle and spoke briefly with Defendant before asking him to exit the vehicle. As Defendant stepped out, Agent Kluttz saw what he described as a "small baggie . . . of crack cocaine fall from [Defendant's] person . . . to the pavement . . . ." Agent Kluttz then placed Defendant under arrest.

Defendant was indicted on 2 February 2015 for felony possession of cocaine, possession of drug paraphernalia, and possession of an open container of alcohol in the passenger area of a motor vehicle. Defendant was subsequently indicted on 17 August 2015 for having attained habitual felon status. Defendant's case was tried before a jury on 22 and 23 February 2016.

At trial, the State presented testimonial evidence from Agent Kluttz in which he repeatedly identified the substance that fell from Defendant as "crack cocaine." Agent Kluttz based this identification on his training, experience working with the ALE, and his perceptions of the substance and packaging. Agent Kluttz was not tendered as an expert. The State introduced additional evidence in the form of a lab report and expert

testimony by Jennifer McConnell ("McConnell"), a chemical analyst with the North Carolina State Crime Laboratory. McConnell testified that the results of her testing indicated that the substance in the bag was consistent with cocaine.

The jury found Defendant guilty of possession of cocaine, possession of drug paraphernalia, and possession of an open container of alcohol in the passenger area of a motor vehicle. Defendant pleaded guilty to having attained habitual felon status. The trial court consolidated the convictions and sentenced Defendant to an active prison term of 42 to 63 months. Defendant filed timely notice of appeal.

Analysis

I. Admissibility of Lay Opinion Testimony

[1] Defendant contends that Agent Kluttz's identification of the substance as crack cocaine was inadmissible lay opinion testimony because it was not based on a scientifically valid chemical analysis. While we agree that Agent Kluttz's testimony was inadmissible, we hold that Defendant has failed to demonstrate plain error.

A. Standard of Review

Defendant did not preserve the issue of the admissibility of Agent Kluttz's testimony at trial because he failed to lodge an objection when the challenged testimony was elicited. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334 (citation omitted). A fundamental error requires a defendant to establish prejudice, *i.e.*, that the error "had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (internal quotation marks and citations omitted).

B. Discussion

In a criminal case, the State must prove every element of a criminal offense beyond a reasonable doubt. *State v. Billinger*, 9 N.C. App. 573, 575, 176 S.E.2d 901, 903 (1970). In the context of a controlled substance case, "the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution." *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010).

The North Carolina Supreme Court held in *Ward* that "[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance

beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.* at 147, 694 S.E.2d at 747. The appellant in *Ward* challenged testimony by an expert in forensic chemistry who identified the substance in question as a controlled substance based only on a visual inspection. *Id.* at 139, 694 S.E.2d at 742-44. The Supreme Court held that the testimony was "lacking in sufficient credible indicators to support [its] reliability . . . ." *Id.* at 144, 694 S.E.2d at 745. In so holding, the Supreme Court rejected the State's argument that such a deficiency should only affect the weight the jury assigned to the testimony. *Id.* at 147, 694 S.E.2d at 747. "Adopting that view would circumvent the fundamental issue at stake, that is, the reliability of the evidence, and would risk a greater number of false positive identifications." *Id.* at 147, 694 S.E.2d at 747.

Ward followed *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), in which the Supreme Court reversed a majority decision of this Court for "the reasons stated in the dissenting opinion," resulting in a new trial for a defendant convicted of trafficking based upon the testimony of a law enforcement officer who visually identified the substance at issue as cocaine. The dissent, adopted by the Supreme Court, reasoned that by providing "procedures for the admissibility of [] laboratory reports" and "enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86-87 (2008), *rev'd per curiam*, 363 N.C. 8, 673 S.E.2d 658 (Steelman, J., concurring in part and dissenting in part) (citations omitted).

The *Ward* and *Llamas-Hernandez* decisions result in two general rules. First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. *See State v. Hanif*, 228 N.C. App. 207, 212, 743 S.E.2d 690, 693 (2013) (holding that a trial court committed plain error by allowing testimony about the composition of a controlled substance based on a visual inspection when such testimony was the only evidence presented by the State identifying the substance in question); *see also State v. Woodard*, 210 N.C. App. 725, 731, 709 S.E.2d 430, 435 (2011) (holding that the State was not required to conduct a chemical analysis on the substance because the State's evidence sufficiently established the identity of the stolen drugs). Second, testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible. *See*, *e.g.*, *State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011) (explaining

that an officer's "visual identification testimony would be inadmissible because testimony identifying a controlled substance 'must be based on a scientifically valid chemical analysis and not mere visual inspection' ") (quoting *Ward*, 364 N.C. at 142, 694 S.E.2d at 744); *see also State v. Meadows*, 201 N.C. App. 707, 712-13, 687 S.E.2d 305, 309 (2010) (holding that the trial court erred by admitting a police officer's lay testimony that he "collected what he believed to be crack cocaine" based on his visual identification of the substance).

However, the Supreme Court in *Ward* noted that its decision did not prohibit law enforcement officers from using visual identification of controlled substances for investigative purposes. *Id.* at 147-48, 694 S.E.2d at 747. Nor do we understand *Ward* or *Llamas-Hernandez* to prohibit testimony by an officer regarding visual identification of a controlled substance for the limited purpose of explaining the officer's investigative actions.

Here, Agent Kluttz, throughout his testimony, offered his lay opinion that the substance in question was crack cocaine. Our precedent prohibits such testimony if offered as substantive evidence. Because defense counsel did not object to the testimony, we have no way of knowing whether it was offered to establish the actual nature of the substance or merely to explain Agent Kluttz's subsequent actions in seizing the substance and arresting Defendant.

More importantly, the State introduced without objection testimony by McConnell, an expert in forensic testing for the presence or absence of controlled substances, as well as the results of McConnell's chemical analysis of the substance that Agent Kluttz saw drop from Defendant's person. McConnell testified that her chemical analysis involved mixing the substance with a reagent, viewing it through a microscope, and looking for crystals of a unique shape specific to cocaine. Based on the chemical analysis, McConnell formed the opinion that the substance in the baggie that fell to the pavement at Defendant's feet included an ingredient consistent with the presence of cocaine.

Given the expert testimony in this case based upon a scientifically reliable method, we cannot conclude that Agent Kluttz's testimony that he identified the substance on sight as crack cocaine had a probable impact on the jury's verdict of guilt. Accordingly, Defendant has failed to demonstrate prejudice and therefore failed to establish plain error.

Defendant also argues in passing in his briefs that there were holes in the procedures surrounding the chain of custody of the substance as it made its way to the North Carolina State Crime Laboratory for testing.

We also recognize that at trial, Defendant sought to exclude the results of the State Crime Lab analysis by filing a motion *in limine*. However, Defendant does not challenge the trial court's admission of those results or the testimony by McConnell, and therefore we accept her testimony as properly before the trial court.

II. Ineffective Assistance of Counsel

[2] Defendant contends that his constitutional right to effective assistance of counsel was violated when his trial counsel failed to object to Agent Kluttz's lay opinion testimony visually identifying the substance that fell from Defendant as crack cocaine. We disagree.

Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. *See*, *e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001). Such claims may be reviewed on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d at 524-25 (citation omitted). The record here is sufficient to address the ineffective assistance claim, and in the interest of judicial economy we decide the merits.

To establish that he received ineffective assistance of counsel, a defendant must show not only that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" but also "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 686-87, 80 L.Ed.2d 674, 693 (1984). To meet this second prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L.Ed.2d at 698.

Here, in light of the chemical analysis and related expert opinion that the substance that fell from Defendant's person had unique chemical properties consistent with the presence of cocaine, Defendant has failed to establish a reasonable probability that if his trial counsel had objected, and if the trial court had excluded Agent Kluttz's visual identification testimony, the result of the proceeding would have been different. Accordingly, Defendant's argument is without merit.[1]

1. Because Defendant cannot establish prejudice, we need not consider whether his trial counsel's performance was deficient.

Conclusion

For the foregoing reasons, we hold that Defendant failed to establish that the trial court committed plain error by admitting Agent Kluttz's opinion testimony identifying the substance that fell from Defendant as cocaine, and that Defendant was not denied effective assistance of counsel.

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LARRY WAYNE GLIDEWELL, JR., DEFENDANT

No. COA16-1001

Filed 15 August 2017

1. Appeal and Error—appealability—writ of certiorari—defective notice of appeal

The Court of Appeals granted defendant's petition for writ of certiorari in a habitual misdemeanor larceny case and reached the merits of his arguments even though defendant gave defective notice of appeal.

2. Indictment and Information—habitual misdemeanor larceny—acting in concert jury instruction—allegation beyond essential elements of crime

The trial court did not err in a habitual misdemeanor larceny case by giving an acting in concert instruction even though it was not listed in the indictment. The alleged errors in the indictment did not prevent defendant from preparing his defense, and defendant was not at risk for a subsequent prosecution for the same incident. Further, the numerical discrepancies for the stolen items did not amount to error.

3. Aiding and Abetting—jury instruction on acting in concert—habitual misdemeanor larceny—sufficiency of evidence—present at the scene—common plan or purpose

The trial court did not err in a habitual misdemeanor larceny case by instructing the jury on the theory of acting in concert where

the evidence allowed the jury to draw a reasonable inference that defendant was present at the scene of the crime, that defendant acted together with another person pursuant to a common plan or purpose, and that the other person did some of the acts necessary to constitute larceny.

Appeal by defendant from judgment entered 8 June 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Mark L. Hayes for defendant-appellant.

BERGER, Judge.

Larry Wayne Glidewell, Jr. ("Defendant") appeals from his conviction for habitual misdemeanor larceny. Defendant gave defective notice of appeal, but we grant his petition for writ of certiorari and reach the merits of his arguments. Defendant asserts that the trial court erred in giving an acting in concert jury instruction. First, Defendant argues that he was prejudiced by this instruction because it created a fatal variance between his indictment and the evidence supporting his conviction. Second, he argues that the State introduced insufficient evidence to warrant such an instruction. We review each argument in turn and find neither compel reversal of his conviction.

Factual and Procedural History

The evidence introduced by the State at trial tended to show that on June 11, 2015, Defendant and Darian Parks ("Parks") walked into the Southern Pines Belk Department Store ("Store") together. Both men removed several men's shirts from their display in the Store's Nautica section and concealed the shirts underneath their clothing. The men then exited the Store without paying.

As Defendant and Parks left the store, Brian Hale ("Hale"), the Store's Loss Prevention Officer, followed the two men into the parking lot and observed them leave in a silver Chevrolet Malibu. After Defendant and Parks drove away, Hale returned to the Store and found a price tag for $34.50 on the floor, which he deduced had been removed from one of the shirts. Hale and two of the Store's loss prevention associates identified the men who stole the shirts on the Store's surveillance camera

video as Defendant and Parks. Hale also provided the Southern Pines Police with the make, model, and license plate number of the vehicle in which the men fled.

On January 4, 2016, a Moore County grand jury indicted Defendant for habitual misdemeanor larceny under N.C. Gen. Stat. § 14-72(b)(6). Parks, as co-defendant, pleaded guilty to the charges brought against him for this same set of operative facts prior to Defendant's trial.

On June 8, 2016, Defendant was tried before a jury in Moore County Superior Court. Before Defendant's jury was impaneled, Defendant knowingly and voluntarily admitted to four prior misdemeanor larcenies used by the State to elevate the present charge from misdemeanor larceny to a Class H felony of habitual misdemeanor larceny. At the close of the State's case-in-chief, Defendant presented no evidence and chose not to testify. After jury deliberations, Defendant was found guilty, sentenced to an active prison term of eleven to twenty-three months, and ordered to pay $241.50 in restitution. The record indicates that Defendant gave no oral or written notice of appeal at trial.

Petition for Writ of Certiorari

[1] On the day following trial, June 9, 2016, Defendant's trial counsel gave oral notice of appeal. The trial court made appellate entries and appointed appellate counsel for Defendant. However, for notice of appeal in a criminal action to be effective, it must either be given orally at trial or be filed with the clerk of superior court and served on adverse parties within fourteen days after the court's entry of judgment. N.C.R. App. P. 4(a)(1) and (2) (2016). Because trial counsel's notice of appeal was neither given orally "at trial" nor filed with the clerk, it was defective. For this reason, on November 22, 2016, Defendant filed a petition for writ of certiorari asking this Court to consider the merits of his appeal.

In response to Defendant's petition, the State conceded it was aware of Defendant's intent to appeal and acknowledged review of Defendant's conviction was proper. Accordingly, we grant Defendant's petition for writ of certiorari and will review the merits of his appeal. *See* N.C.R. App. P. 21(a) (2016).

Analysis

Defendant appeals his conviction by asserting two assignments of error. First, Defendant argues the trial court created a fatal variance between the allegations in his indictment and the evidence supporting

his conviction when it delivered an acting in concert instruction to the jury. Second, Defendant argues the acting in concert jury instruction should not have been given by the trial court because the State introduced insufficient evidence showing Defendant committed larceny in concert with another person. As explained below, we find neither argument has merit.

I. Fatal Variance

[2] In Defendant's first assignment of error, he asserts that a fatal variance was created when the trial court instructed the jury on a theory of acting in concert because the indictment with which Defendant was charged contained no indication that the State would proceed on this theory of criminal liability. Therefore, Defendant contends his conviction for habitual misdemeanor larceny should be vacated. We disagree.

A trial court, generally, commits prejudicial error when it "permit[s] a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Shipp*, 155 N.C. App. 294, 300, 573 S.E.2d 721, 725 (2002) (citation and quotation marks omitted). As a result, trial courts "should not give [jury] instructions which present . . . possible theories of conviction . . . either not supported by the evidence or not charged in the bill of indictment." *Id.* (citation and quotation marks omitted). "It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State's proof must conform to the specific allegations contained therein." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014), *disc. rev. denied*, ___ N.C. ___, 775 S.E.2d 852 (2015) (citation, quotation marks, and brackets omitted).

When allegations asserted in an indictment fail to "conform to the equivalent material aspects of the jury charge," our Supreme Court has held that a fatal variance is created, and "the indictment [is] insufficient to support that resulting conviction." *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (citation omitted). Furthermore, for "a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d, 453, 457 (2002) (citations omitted). The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring "that the defendant is able to prepare his defense against the crime with which he is charged and [(2)] . . . protect[ing] the defendant from another prosecution for the same incident." *Id.* (citations omitted). However, "a variance . . . does not require reversal unless the defendant is prejudiced as a result." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371, *disc. rev. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996) (citation omitted).

In cases addressing an acting in concert jury instruction, this Court has stated that acting in concert, as well as aiding and abetting, are "theories of criminal liability," "theories of guilt," "theories of culpability," and "theories upon which to establish guilt." *State v. Estes*, 186 N.C. App. 364, 372, 651 S.E.2d 598, 603 (2007), *disc. rev. denied*, 362 N.C. 365, 661 S.E.2d 883 (2008). A criminal indictment "must allege all of the essential elements of the crime sought to be charged[,]" and allegations which do not concern "the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citations and quotation marks omitted).

Therefore, "the allegation . . . that [a] defendant acted in concert . . . is an allegation beyond the essential elements of the crime charged and is . . . surplusage." *Id. See Estes*, 186 N.C. App. at 372, 651 S.E.2d at 603 (holding that the prosecution's variation of a theory of criminal liability, from that of acting in concert to aiding and abetting, did not constitute a substantial modification to the State's original indictment because (1) the change only impacted surplusage to the principal criminal offense charged; and (2) the defendant was not rendered unable to prepare his own defense to the principal criminal offense). Furthermore, theories of criminal liability are not required to be included in an indictment. *See State v. Baskin*, 190 N.C. App. 102, 110, 660 S.E.2d 566, 573, *disc. rev. denied*, 362 N.C. 475, 666 S.E.2d 648 (2008).

In North Carolina, " '[t]he essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently.' " *State v. Sheppard*, 228 N.C. App. 266, 269, 744 S.E.2d 149, 151 (2013) (quoting *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002)). If the larceny was committed after four prior misdemeanor larceny convictions, it is a Class H felony without regard to the value of the property taken. N.C. Gen. Stat. § 14-72(a) and (b)(6) (2015).

Here, Defendant's indictment for larceny alleged that he "unlawfully, willfully, and feloniously did steal, take, and carry away two shirts, the personal property of Belk, Inc., a corporation capable of owning property, such property having an approximate value of $69.00." The indictment contained each essential element of larceny.

After the close of evidence and before delivering the jury instructions, the trial court indicated it would give an acting in concert jury instruction. Defendant's counsel raised a general objection to this instruction, preserving the issue for appeal, but was overruled. Directly after, the trial court instructed the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, *acting either by himself or acting together with another person*, took and carried away Belk, Inc.'s property without Belk, Inc.'s consent, knowing that he was not entitled to take it, and intended at that time to deprive the victim of its use permanently, it would be your duty to return a verdict of guilty.

(Emphasis added).

As seen above, the addition of a theory of liability to the jury instruction, specifically that "the defendant, *acting either by himself or acting together with another person*, took and carried away Belk, Inc.'s property," failed to create a fatal variance between the indictment, which stated no theory of liability, and the jury instruction. The acting in concert theory of liability was not one of the "essential elements of larceny," and it needed not be alleged in the indictment.

Defendant also argues that a fatal variance existed among his indictment, the jury instructions, and his jury verdict sheet because each held Defendant accountable for stealing a different number of shirts. However, two problems beset this argument. First, Defendant voiced no objection based upon this alleged variance at trial and posited no arguments for plain or fundamental error on appeal. *See State v. Gilbert*, 139 N.C. App. 657, 672-74, 535 S.E.2d 94, 103 (2000) (holding when a defendant fails to object to a verdict sheet's submission to the jury, the error is not considered prejudicial unless the error is fundamental); *State v. Turner*, 237 N.C. App. 388, 390-91, 765 S.E.2d 77, 80-81 (2014) (holding when a defendant fails to object to an indictment or jury instructions until after the jury returns its verdict at trial, this Court treats these issues as unpreserved and reviews them under the plain error standard, which requires they constitute a fundamental error to warrant reversal), *disc. rev. denied*, 368 N.C. 245, 768 S.E.2d 563 (2015); N.C.R. App. P. 10(a)(2) (2016) (establishing "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . .").

Second, neither the jury instruction nor the verdict sheet needed to have the number of items stolen. *See State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002) (holding "no requirement [mandates] that a written verdict contain each element of the offense to which it refers" (citations and quotation marks omitted)); *State v. McClain*, 282 N.C.

396, 400, 193 S.E.2d 113, 115-16 (1972) (holding "[a]ny error or omission by the court in its review of the evidence in the charge to the jury must be . . . called to the attention of the court so that the court may have an opportunity to make the appropriate correction"); *see also* N.C. Gen. Stat. § 15A–1232 (2015) (establishing when a trial court instructs a jury, it must charge every essential element of the offense, but it is not required to "state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence").

The alleged errors in the indictment did not prevent Defendant from preparing his defense, and Defendant was not and is not at risk for a subsequent prosecution for the same incident. *See Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457. Furthermore, the numerical discrepancies to which Defendant points in his indictment, jury instructions, and verdict sheet did not amount to error. Accordingly, the alleged variance was not fatal. This assignment of error is without merit.

II. Sufficient Evidence to Support an Acting in Concert Jury Instruction

[3] Defendant next argues that the trial court erred when instructing the jury on the theory of acting in concert because no evidence supported that theory of liability. Specifically, Defendant contends the State's evidence was insufficient to show that Defendant and Parks acted with a common purpose to commit larceny or that Defendant aided or encouraged Parks to commit larceny. Ultimately, Defendant asserts the evidence showed he was "simply present" when Parks committed larceny. We disagree.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974) (citations omitted). "Properly preserved challenges to the trial court's decisions regarding jury instructions are reviewed *de novo* . . . ." *State v. King*, 227 N.C. App. 390, 396, 742 S.E.2d 315, 319 (2013) (citation and quotation marks omitted).

Jury instructions are considered

> contextually and in [their] entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under

> such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (citations omitted).

Under a theory of acting in concert, a jury can find a defendant guilty where "he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime." *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994), *cert. denied*, ___ N.C. ___, 533 S.E.2d 475 (1999) (citations omitted). A jury instruction on the theory of "acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and acted together with another who [completed] acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Cody*, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (citation and quotation marks omitted). Furthermore, when the State presents such evidence, "the judge *must* explain and apply the law of 'acting in concert.' " *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975) (emphasis added).

In the case *sub judice*, the trial court indicated at the close of evidence that it would give an acting in concert jury instruction. Defendant's counsel raised a general objection to this instruction, preserving the issue for appeal, but was overruled. The trial court then instructed the jury, *inter alia*, on acting in concert as follows:

> For a defendant to be guilty of a crime it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit larceny, each of them, if actually or constructively present, is guilty of the crime. A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty the defendant must aide or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.

Indeed, the evidence presented at trial tended to show Defendant was more than simply present at the scene of the larceny at issue. The State's evidence illustrated that he acted together with Parks, who completed acts necessary to constitute larceny pursuant to a common plan

or purpose. *See Cody*, 135 N.C. App. at 728, 522 S.E.2d at 781. Evidence also pointed out that Defendant rode with Parks in the same car to the Store; Defendant and Parks entered the Store together; Defendant and Parks looked over merchandise in the same section of clothing; Defendant and Parks were seen on surveillance video returning to the same area behind a clothing rack and stuffing shirts in their pants; and Defendant and Parks left the Store within seconds of each other and exited the Store's parking lot in the same vehicle driven by Parks.

We hold this evidence was sufficient to support a jury instruction on acting in concert to commit larceny. The evidence allowed the jury to conclude, or draw a reasonable inference, that Defendant was present at the scene of the crime, that Defendant acted together with Parks pursuant to a common plan or purpose, and that Parks did some of the acts necessary to constitute larceny. Defendant failed to meet his burden by showing that "the jury was misled or that the verdict was affected" as a result. *King*, 227 N. C. App. at 396, 742 S.E.2d at 319 (citation omitted). This assignment of error, like the first, is also without merit.

Conclusion

The trial court did not err by giving the acting in concert instruction. No fatal variance was created between the allegations in Defendant's indictment and evidence supporting his conviction. The State introduced sufficient evidence to warrant instructing the jury on an acting in concert theory of liability. Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and HUNTER concur.

STATE v. MAY

[255 N.C. App. 119 (2017)]

STATE OF NORTH CAROLINA
v.
JAHRHEEL IKLE MAY

No. COA16-1121

Filed 15 August 2017

Sentencing—juvenile—life in prison without the possibility of parole—failure to make statutorily required findings of fact—no jurisdiction after notice of appeal

The trial court erred in a first-degree murder case by failing to make statutorily required findings of fact on the presence of mitigating factors under N.C.G.S. § 15A-1340.19B before sentencing a juvenile to life in prison without the possibility of parole. Further, the trial court lacked jurisdiction to make findings after defendant gave notice of appeal.

Judge STROUD concurs with separate opinion.

Appeal by defendant from judgment entered 16 July 2015 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 2 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

W. Michael Spivey for defendant-appellant.

BRYANT, Judge.

Where the trial court failed to make statutorily required findings of fact addressing statutory mitigating factors prior to sentencing juvenile defendant to life imprisonment without the possibility of parole, we vacate the sentence imposed and remand for a new sentencing hearing. Further, where the trial court had no jurisdiction to enter findings of fact after defendant gave notice of appeal, we vacate the order entered upon those findings.

On 25 February 2013, a Pitt County grand jury indicted defendant Jahrheel Ikle May on one count of first-degree murder and one count of armed robbery of Anthony Johnson. The matter came on for jury trial during the 13 July 2015 criminal session of Pitt County Superior Court, the Honorable W. Russell Duke, Jr., Judge presiding.

The evidence admitted at trial tended to show that on 2 January 2013, sixteen-year-old defendant May discussed committing a robbery with his older cousin Demetrius Smith: breaking into the home of a "pill dude" who lived in the same Westpointe community of Greenville. Smith believed the "pill dude" had a lot of prescription medication pills. Around 8:00 p.m., Smith drove to defendant's home, where defendant was sitting on the patio with two other men. Smith had intended to talk with defendant about the robbery, but stopped short of doing so. "[M]e and [defendant] were like, nah, we talking around too many people and we—we didn't know if the [pill] dude was home or not so we were just like forget it instead of taking a chance." But shortly afterwards, defendant said he needed to go to the store and borrowed Smith's car for "[p]robably 15, 10 minutes." Following his return, Smith heard sirens and asked defendant, "Did you do something with my car?" Defendant responded that he did not.

The evidence further showed that at about 8:20 p.m. that evening, two men were observed "tussling" in front of a vehicle parked on Westridge Court. Gunshots were fired. The larger of the two men crawled toward the door of a residence, while the smaller man entered the vehicle and drove away. Law enforcement officers soon found Anthony Johnson deceased outside the residence on Westridge Court. Two days later, defendant was arrested and charged with first-degree murder and armed robbery.

While in jail awaiting trial, defendant talked to an inmate about the events leading to Johnson's death. At trial, the inmate testified on behalf of the State to conversations he had with defendant about the shooting, including details the police had not made public. Defendant presented no evidence.

Defendant was convicted of the first-degree murder of Johnson on the basis of malice, premeditation and deliberation, and on the basis of the felony murder rule. Defendant was also convicted of attempted robbery with a dangerous weapon.

At sentencing, several witnesses testified on defendant's behalf: defendant's guidance counselor; an assistant principal; a retired pastor, who was also a correctional officer; a principal of the middle school defendant attended; defendant's mother; defendant's father; and defendant's grandmother. The witnesses testified consistently that defendant was a popular student at school, an athlete, "captain material," "a good kid," and an honors student taking advanced courses. The trial court entered judgment on 16 July 2015 as follows: On the charge of attempted armed robbery with a dangerous weapon, defendant was sentenced to a

term of 64 to 89 months; on the charge of first-degree murder, defendant was sentenced to life imprisonment without the possibility of parole. The sentences were to be served consecutively. Immediately after judgment was entered on 16 July 2015, defendant gave oral notice of appeal.

Almost a month later, on 11 August 2015, the trial court entered an order making findings of fact based on N.C. Gen. Stat. § 15A-1340.19B to support its determination that defendant should be sentenced to life imprisonment without the possibility of parole, as opposed to a lesser sentence of life imprisonment with the possibility of parole.

On appeal, defendant argues the trial court erred by sentencing him to life imprisonment without the possibility of parole, where the trial court failed to make findings of fact and conclusions of law in support of the sentence. Defendant also brings forth several other arguments—e.g., that there was insufficient evidence that defendant was permanently incorrigible; that there was sufficient evidence to demonstrate defendant's crime was the result of transient immaturity; and that the trial court failed to make findings as to all mitigating factors. However, based on our holding as to defendant's first argument, we do not address the remaining ones.

Analysis

Defendant argues that the trial court erred by failing to make findings of fact on the presence of mitigating factors before sentencing him to life in prison without the possibility of parole, and further, the trial court lacked jurisdiction to make findings after defendant gave notice of appeal. We agree.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.' " *Miller v. Alabama*, 567 U.S. 460, 469, 183 L. Ed. 2d 407, 417 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). "In *Miller* . . . , the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Montgomery v. Louisiana*, ___ U.S. ___, ___, 193 L. Ed. 2d 599, 610 (2016). In *Miller*, the Court reasoned that "*Roper* and *Graham* [*v. Florida*, 560 U.S. 48, 176 L.Ed.2d 825 (2010),] establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.' " *Miller*, 567 U.S. at 471, 183 L. Ed.

2d at 418 (quoting *Graham*, 560 U.S. at ___, 176 L. Ed. 2d 825). "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 619 (citation omitted).

> In response to the *Miller* decision, our General Assembly enacted N.C. Gen. Stat. § 15A–1476 *et seq.* ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*." N.C. Sess. Law 2012–148. The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen. Stat. § 15A–1340.19A.

State v. Lovette, 225 N.C. App. 456, 470, 737 S.E.2d 432, 441 (2013) (footnote omitted). Pursuant to General Statutes, section 15A-1340.19B (entitled "Penalty determination"), when a defendant is sentenced to life in prison for first-degree murder under some theory other than the felony murder rule, which compels a sentence of life in prison with parole, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2015). In making its determination,

> [t]he court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

Id. § 15A-1340.19C(a).[1] "This Court has held that 'use of the language "shall" ' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *State v. Antone*, 240 N.C. App.

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1. Section 15A-1340.19B includes the following as mitigating factors that may be submitted to the trial court:

> (1) Age at the time of the offense[;] (2) Immaturity[;] (3) Ability to appreciate the risks and consequences of the conduct[;] (4) Intellectual

408, 410, 770 S.E.2d 128, 130 (2015) (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)).

Here, on 11 August 2015—more than fourteen days after entry of judgment and defendant's notice of appeal—the trial court entered an order making findings of fact pursuant to section 15A-1340.19B. However, "[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and [the period for giving notice of appeal (fourteen days from entry of judgment in a criminal appeal)] has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2015); *see also* N.C. R. App. P. 4(a)(2) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment . . . ."). At that point, "the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred." *State v. Davis*, 123 N.C. App. 240, 243, 472 S.E.2d 392, 394 (1996) (quoting *State v. Cannon*, 244 N.C. 399, 404, 94 S.E.2d 339, 342 (1956)).

The trial court, in the instant case, erred by entering judgment sentencing defendant to life imprisonment without parole without making the statutorily required findings of fact. Further, because defendant gave immediate notice of appeal from the judgment, we hold the trial court was without authority to enter the 11 August 2015 order in a belated attempt at compliance with N.C. Gen. Stat. § 15A-1340.19B.[2] Thus, the trial court failed to comply with the statutory mandate of N.C. Gen. Stat. § 15A-1340.19B, amounting to reversible error. *See Antone*, 240 N.C. App. at 412, 770 S.E.2d 130–31 (vacating the order and judgment of the trial court and remanding for a new sentencing hearing where the trial court failed to set out findings in consideration of four mitigating factors enumerated in section 15A-1340.19B(c)). Accordingly, we vacate the 16 July 2015 judgment sentencing defendant to a term of life imprisonment without the possibility of parole, and we remand the matter for a

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> capacity[;] (5) Prior record[;] (6) Mental health[;] (7) Familial or peer pressure exerted upon the defendant[;] (8) Likelihood that the defendant would benefit from rehabilitation in confinement[; and] (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2015).

2. We also note that the State concedes error by the trial court as the court lacked jurisdiction to make findings of fact after defendant had given notice of appeal.

new sentencing hearing consistent with the statutory obligations in N.C. Gen. Stat. §§ 15A-1340.19B, -1340.19C. We also vacate the trial court's 11 August 2015 order as the court was without jurisdiction to enter the order at that time. *See Davis*, 123 N.C. App. at 243, 472 S.E.2d at 394.

The judgment of the trial court entered 16 July 2015 imposing a sentence of life imprisonment without parole is VACATED AND REMANDED, and the trial court order of 11 August 2015 is VACATED.

Judge DAVIS concurs.

Judge STROUD concurs with separate opinion.

STROUD, Judge, concurring.

I concur with the majority opinion but write separately to note concern about how our courts are addressing their discretionary determination of whether juveniles should be sentenced to life imprisonment without possibility of parole.

On its face, North Carolina General Statute § 15A-1340.19B seems quite clear:

> (c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:
>
> (1) Age at the time of the offense.
>
> (2) Immaturity.
>
> (3) Ability to appreciate the risks and consequences of the conduct.
>
> (4) Intellectual capacity.
>
> (5) Prior record.
>
> (6) Mental health.
>
> (7) Familial or peer pressure exerted upon the defendant.
>
> (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
>
> (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B (2015). But applying these factors has been difficult. Although the trial judge is required to find mitigating factors or the absence of mitigating factors to justify her decisions, and North Carolina General Statute § 15A-1340.19B(c) lists the factors which may be shown as mitigating factors, I am not sure that anyone understands what particular facts found within the factors should be considered as mitigating factors. For example, a trial court may find that a juvenile has done well in school; some may view this is a mitigating factor because it shows the juvenile's prior commitment to bettering himself and potential for improvement while others may view it as not mitigating as it demonstrates the juvenile has a high "[i]ntellectual capability" and thus a better "[a]bility to appreciate the risks and consequences of the conduct" than others his age might. *Id.* Likewise, should a trial court consider a juvenile's chaotic and violent upbringing as lacking any mitigating force, suggesting that he would not benefit from rehabilitation? Or should the trial court consider this as mitigating, since this sort of background may suggest that his behavior may have resulted from "familial or peer pressure exerted upon" him? *Id.*

The United States Supreme Court discussed exactly this sort of problem in *Miller*, as we noted in *Lovette*:

> In *Miller*, in contrasting the cases of the two 14–year–old juveniles under consideration with juveniles in prior cases, the Supreme Court contrasted some of these characteristics of juveniles:
>
> > In light of *Graham's* reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a greater sentence than those adults will serve. In meting out the death penalty, the elision of all these

differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Both cases before us illustrate the problem. Take Jackson's in *Graham* first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that we ain't playin, rather than told his friends that I thought you all was playin. To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. Nonetheless, Miller's past criminal history was limited–two instances of truancy and one of second-degree criminal mischief. That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once

> again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.
>
> *Miller*, 567 U.S. at ___, 183 L.Ed.2d at 422–24 (citations, quotation marks, brackets, and footnote omitted). In this comparison, the Supreme Court demonstrates how a court might weigh the "hallmark features" in sentencing juveniles. *Id.* at ___, 183 L.Ed.2d at 422–24.

State v. Lovette, 233 N.C. App. 706, 720–21, 758 S.E.2d 399, 409–10 (2014) (ellipses omitted).

Many cases from this Court citing North Carolina General Statute § 15A-1340.19B illustrate the problem: For example, in *State v. James*, the trial court made extensive findings of fact regarding the juvenile, but this Court remanded for additional findings since the order did not clearly identify which factors were considered as mitigating and which it considered as "not mitigating":

> For example, and as pointed out by defendant, the trial court found in finding number twenty-three, defendant was once a member of the Bloods gang and wore a self-made tattoo of a B on his arm. Yet that finding further provided, as of October, 2005 defendant was no longer affiliated with the gang. He had been referred to the Charlotte Mecklenburg Police Department Gang of One program that worked with former gang members. This finding could be interpreted different ways—defendant was capable of rehabilitation or rehabilitative efforts had failed. Similarly, the trial court found in finding of fact number nine that at the time of the crime defendant was 16 years, 9 months old. While the finding makes clear that defendant was a juvenile, it is unclear whether defendant's age is mitigating or not. In finding of fact number twenty-six, the trial court found that individuals around the age of 16 can typically engage in cognitive behavior which requires thinking through things and reasoning, but not necessarily self-control. In that same finding, however, the trial court also found, things that may affect an individual's psycho-social development may be environment, basic needs, adult supervision, stressful and toxic environment, peer pressure, group behavior, violence, neglect, and physical and/or sexual abuse. The

trial court's other findings show that defendant has experienced many of those things found by the trial court to affect development.

Instead of identifying which findings it considered mitigating and which were not, after making its findings, the trial court summarized its considerations in finding of fact thirty-four as follows:

> The Court, has considered the age of the Defendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the Defendant, but only helpful as to the light the juvenile investigation sheds upon Defendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by Defendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered Defendant's statements to the police and his contention that it was his co-defendant who planned and directed the commission of the crimes against the victim, the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the Defendant that the mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

This finding in no way demonstrates the absence or presence of any mitigating factors. It simply lists the trial court's considerations and final determination.

___ N.C. App. ___, 786 S.E.2d 73, 83-84 (2016) (citations, quotation marks, ellipses, and brackets omitted), *appeal dismissed and disc.*

review allowed, ___ N.C. ___, 796 S.E.2d 789, *disc. review allowed*, ___ N.C. ___, 797 S.E.2d 6 (2017).

This Court remanded a similar order to that in James in *State v. Antone*, ___ N.C. App. ___, 770 S.E.2d 128 (2015). *Compare James*, ___ N.C. App. ___, 786 S.E.2d at 83-84. After making brief findings of fact, including some recitations of testimony, regarding the juvenile's life, characteristics, and circumstances of the crime, the trial court determined there were "insufficient mitigating factors to find life with parole," and then this Court determined

> that the trial court's findings of fact and order fail to comply with the mandate set forth in N.C. Gen. Stat. § 15A–1340.19C that requires the court to include findings on the absence or presence of any mitigating factors. The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A–1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

240 N.C. App. 408, 412, 770 S.E.2d 128, 130 (2015).

I would note that the order on appeal in this case, although entered without jurisdiction and requiring remand for that reason, bears a striking resemblance to the orders in *James* and *Antone* in that it makes findings of fact regarding the defendant's life and upbringing but does not identify any particular factor as a mitigating or not mitigating factor. *Compare James*, ___ N.C. App. at ___, 786 S.E.2d at 83-84; *Antone*, 240 N.C. App. at 412, 770 S.E.2d at 130. The order also finds that "the killing . . . involved the shooting of the victim numerous times including one shot in the victim's back[,]" and it appears the trial court considered this as not mitigating, because it is the only finding listed after the trial court noted "[t]here are no further mitigating factors or circumstances." But the circumstances of the crime are not listed as one of the potential *mitigating* factors and "aggravating" factors are not part of the analysis under North Carolina General Statute § 15A-1340.19B. See N.C. Gen. Stat. § 15A-1340.19B.

Indeed, North Carolina General Statute § 15A-1340.19B identifies only potential mitigating factors, so factors can either be mitigating or not mitigating factors. *See id.* There is no consideration of what we may

in other contexts consider as "aggravating factors," so a factor which the trial court considers to support life imprisonment without the possibility of parole is referred to as a factor which is "not mitigating" instead of an aggravating factor. *See generally id.* This is an important distinction, although the negative phraseology which may be required to describe a factor that is "not mitigating" – but is also not "aggravating" – can be quite awkward. "Aggravating factors" apply in other situations of sentencing adults and typically must be determined by a jury based upon *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *See also* N.C. Gen. Stat. § 15A-1340.16; *State v. McQueen*, 181 N.C. App. 417, 422, 639 S.E.2d 131, 134 (2007) ("In response to the ruling in *Blakely*, the North Carolina General Assembly enacted a procedure for aggravating factors to be proven to a jury under N.C.G.S. § 15A–1340.16.") North Carolina General Statute § 15A-1340.19B is only dealing with the terrible and thankfully rare situation where a juvenile has committed such an atrocious crime he faces the possibility of life imprisonment without parole. *See generally* N.C. Gen. Stat. § 15A-1340.19B. North Carolina General Statute § 15A-1340.19B does not seem to envision much if any weight for the horrific nature of the crime, as would be appropriate in adult sentencing where both mitigating and aggravating factors are weighed. *Contrast* N.C. Gen. Stat. §§ 15A-1340.16; -1340.19B. Here, only mitigating factors or the lack thereof should be considered in the sentencing analysis. *See* N.C. Gen. Stat. § 15A-1340.19B.

Again, I would caution that almost all of the cases subject to North Carolina General Statute § 15A-1340.19B arose from heinous and shocking crimes; by definition, all are first degree murders, based on factors other than felony murder, *see id.*, committed by minors. *See* N.C. Gen. Stat. § 15A-1340.19A (2015). If the facts of the particular crime are treated as a factor which bears much weight in the analysis, then life imprisonment without the possibility of parole will be the rule and not the exception. But under *Miller*, life imprisonment without parole for juveniles should be the exception, not the rule:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

> irreparable corruption. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller v. Alabama, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (2012) (citations, quotation marks, and footnote omitted).

Furthermore, the Supreme Court has noted that a juvenile's past disadvantages should be an important factor in determining his culpability, noting that in a prior case:

> a 16–year–old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence particularly relevant—more so than it would have been in the case of an adult offender. We held: Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability.

Id. at 2467, 183 L. Ed. 2d at 422 (citation, quotation marks, and brackets omitted). Of course, imposition of a sentence of life imprisonment with the possibility of parole is still not a guarantee that a defendant will ever be released, and no one can predict how a juvenile may change, for better or worse, over the passing decades of his life.[1] As the United States Supreme Court noted, it is a "rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 2469, 183 S.E.2d at 424.

Both trial courts and appellate courts normally consider only the case before the court and not how that case may compare to other similar cases. And I do not know the statistics regarding the percentages of juveniles who have been eligible to be sentenced to life imprisonment without the possibility of parole who have actually received this sentence instead of the possibility of parole. I do not know the statistics regarding

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1. North Carolina General Statute § 15A-1340.19A provides that a sentence of "life imprisonment with parole" requires that "the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (quotation marks omitted).

the percentages of juveniles who have been eligible to be sentenced to life imprisonment without the possibility of parole who have actually received this sentence instead of the possibility of parole, but according to *Miller*, that percentage should be very small. *Id.* Convictions of juveniles for first degree murder are rare, and within that pool of eligible juveniles who have committed these crimes, sentences of imprisonment for life without the possibility of parole should be "uncommon" as well, if our courts are to comply with the law as set forth by the United States Supreme Court. *Id.*

STATE OF NORTH CAROLINA
v.
MONTANELLE DEANGELO POSEY

No. COA16-937

Filed 15 August 2017

Probation and Parole—error in revocation of probation—mootness—willful violation—missed curfew—enhanced sentencing for subsequent offenses

Defendant's appeal from a judgment revoking his probation and activating his suspended sentence was dismissed as moot even though the trial court lacked jurisdiction to revoke probation under the Justice Reinvestment Act. The pertinent offenses occurred prior to 1 December 2011, but defendant had already served his time and would not suffer future collateral consequences from the trial court's error. N.C.G.S. § 15A-1340.16(d)(12a), providing for enhanced sentencing for subsequent offenses, was actually triggered by the trial court's finding that defendant was in willful violation of his probation for missing curfew.

Judge ZACHARY dissenting.

Appeal by Defendant from judgment entered 20 December 2012 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather A. Haney, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

DILLON, Judge.

Montanelle Deangelo Posey ("Defendant") appeals from a judgment revoking his probation and activating his suspended sentence. After careful consideration, we conclude Defendant's appeal is moot and, therefore, dismiss his appeal.

I. Background

Defendant was placed on 36 months of supervised probation, beginning after his release from incarceration, for certain crimes he committed prior to April 2011.

While on probation, a trial court found that Defendant had not been at his residence during a mandatory curfew on two occasions in 2012, and that these absences constituted willful violations of a condition of his probation and that these violations constituted *absconding* supervision. The trial court entered judgment finding Defendant in willful violation of his probation, revoking his probation on the basis of absconding and activating his suspended sentence. Defendant appealed.

II. Appellate Jurisdiction

As an initial matter, Defendant concedes that his notice of appeal was defective for failure to satisfy multiple procedural requirements for giving notice of appeal as set out in N.C. R. App. P. 4. In recognition of these defects, Defendant has filed a petition for writ of *certiorari* contemporaneously with the filing of his appellate brief requesting that this Court review the trial court's judgment revoking his probation. In our discretion, we allow Defendant's petition for writ of *certiorari*.

III. Analysis

The State concedes that the trial court lacked jurisdiction to revoke Defendant's probation under the Justice Reinvestment Act, as the offenses he committed for which he was placed on probation occurred prior to 1 December 2011.

The State only argues that the appeal is moot as Defendant has served his time.

A pending appeal from a judgment that has been fully effectuated is generally moot because a subsequent appellate decision "cannot have

any practical effect on the existing controversy." *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (quotation marks and citation omitted). However, before an appeal is dismissed for mootness, "it is necessary to determine whether collateral legal consequences of an adverse nature may result." *State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009). If so, the appeal is not moot. *A.K.*, 360 N.C. at 452, 628 S.E.2d at 755.

Here, Defendant contends that he may suffer collateral consequences as a result of the trial court's alleged error in the event he is subsequently convicted of a new crime. Defendant points to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2015), which provides that, for sentencing purposes, an aggravating factor is found where "[t]he defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence . . . ." As such, a result of the trial court's alleged error in revoking Defendant's probation is that Defendant may receive an enhanced sentence if he is ever convicted of a subsequent offense.

We conclude that Defendant's argument is misplaced. Specifically, Defendant makes no argument that the trial court had erred in finding him in willful violation of his probation, the factor that triggers N.C. Gen. Stat. § 15A-1340.16(d)(12a). Rather, Defendant only argues that the trial court erred in revoking his probation based on the application of the Justice Reinvestment Act, which did not take effect until after Defendant violated his probation. However, the fact that Defendant's probation was revoked, in and of itself, does not trigger the application of N.C. Gen. Stat. § 15A-1340.16(d)(12a). The only part of the trial court's judgment which could have any future detrimental effect is the finding that Defendant was in willful violation of his probation, a finding that Defendant does not challenge. And, clearly, the trial court acted within its authority in entering its finding of willfulness, notwithstanding that it may have erroneously applied N.C. Gen. Stat. § 15A-1340.16(d)(12a). Specifically, the conditions of Defendant's probation included a mandatory curfew; Defendant was cited for violating this curfew; the trial court had the jurisdiction to hold its hearing to consider Defendant's violation; and the trial court found that Defendant violated his curfew and that the violation was willful. Therefore, since Defendant will not suffer future collateral consequences stemming from the trial court's error *in revoking his probation*, we conclude that Defendant's appeal is moot.

DISMISSED.

Judge BERGER concurs.

Judge ZACHARY dissenting by separate opinion.

ZACHARY, Judge, dissenting:

In this case the trial court's revocation judgment was entered only upon a finding that defendant had absconded supervision. The trial court, however, lacked the statutory authority to revoke defendant's probation on the basis of absconding and, as a result, the revocation judgment was erroneous as a matter of law. Should this erroneous judgment remain in place, it could subject defendant to future adverse collateral legal consequences. For these reasons, the instant appeal is not moot and the revocation judgment should be vacated. Accordingly, I dissent from the majority opinion.

The general rule is that "this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist." *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (citation and quotation marks omitted). When a defendant has been released from custody, "the subject matter of [that] assignment of error has ceased to exist and the issue is moot." *Id.* at 475, 390 S.E.2d at 135. But " '[w]hen the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.' " *State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). Pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2015), a trial court may sentence a defendant to a term in the aggravated range upon proof that:

> The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

Although it concedes that defendant's probation was erroneously revoked on the basis of absconding, the State asserts, and the majority agrees, that this appeal is moot because defendant has failed to argue

that the trial court erred in finding that defendant willfully violated the terms of his probation. According to the majority, it is this finding that may trigger subsection 15A-1340.16(d)(12a)'s aggravating factor in the future, not the revocation itself. Yet the majority fails to recognize that the revocation judgment was entered *only* upon a finding that defendant absconded supervision. As explained below, defendant was not subject to the absconding condition set forth in N.C. Gen. Stat. § 15A-1343(b)(3a), and the trial court lacked statutory authority to enter the revocation judgment in the first instance.

In 2011, our General Assembly enacted the Justice Reinvestment Act ("JRA"), which

> modified our probation statutes in two important ways. First, the JRA made the following a regular condition of probation: "Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." *See* N.C. Gen. Stat. § 15A-1343(b)(3a) (2011). Second, the JRA revised N.C. Gen. Stat. § 15A-1344 to provide that a trial court may only revoke probation if the defendant commits a criminal offense [under N.C. Gen. Stat. § 15A-1343(b)(1)] or "absconds" as defined by the revised Section 15A-1343(b)(3a). *See* N.C. Gen. Stat. § 15A-1344(a) (2011).

State v. Hunnicutt, 226 N.C. App. 348, 354, 740 S.E.2d 906, 910-11 (2013). Under the JRA, the new absconding provision was made applicable only to offenses committed on or after 1 December 2011. *Id.* at 355, 740 S.E.2d 906 at 911. However, "the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011." *Id.* at 355, 740 S.E.2d 906 at 911. "Consequently, a defendant who committed the offense underlying his probation before 1 December 2011 but who violated the conditions of his probation on or after that date cannot have his probation revoked for absconding." *State v. Johnson*, __ N.C. App. __, __, __ S.E.2d __, __, No. COA16-734, 2017 WL 3027266, at *4 (July 18, 2017) (recognizing that "[t]his irregularity in the statutes is colloquially referred to as a 'donut hole.' ").

In the present case, defendant admitted to violating several conditions of his probation, but he specifically challenged the absconding allegation. In announcing its ruling at the end of the revocation hearing, the trial court did not find that defendant had admitted any violations; instead, the court found only that defendant "ha[d], in fact, absconded" and activated his sentence on that basis.

The revocation judgment was then entered on a pre-printed form, "Judgment and Commitment Upon Revocation of Probation-Felony," AOC Form CR-607 Rev. 12/12, which includes a section labeled "FINDINGS" with various optional subsections. The trial court checked finding No. 5(a), indicating that the court revoked defendant's probation "for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a)[.]" Because in none of the violation reports filed does the probation officer allege that defendant violated subdivision 15A-1343(b)(1), the trial court did not make a finding that defendant had committed a new criminal offense. In addition, the trial court did not check finding No. 5(b), which is used when a defendant's probation is revoked for violation of a condition of his probation after serving two prior periods of confinement in response to violations under subsection 15A-1344(d2). Considering the trial court's oral and written findings together, defendant's probation was necessarily revoked based upon a finding that he had absconded supervision in violation of subsection 15A-1343(b)(3a).

As defendant committed the underlying offenses prior to 1 December 2011, he was not subject to the JRA's absconding condition of probation enacted in subsection 15A-1343(b)(3a). The trial court, therefore, lacked statutory authority to revoke defendant's probation based on the finding that he had absconded supervision. The appropriate disposition on appeal would normally be to reverse the revocation judgment and "remand to the trial court for entry of an appropriate judgment for Defendant's admitted probation violations consistent with the provisions of N.C. Gen. Stat. § 15A-1344." *State v. Nolen*, 228 N.C. App. 203, 206, 743 S.E.2d 729, 731 (2013) (holding that, given the changes produced by the JRA and the date of the defendant's underlying offenses, the trial court erred in revoking his probation on the basis of absconding). However, given that defendant has already served his full sentence, that option is unavailable in this case. If this Court fails to address the issue raised by defendant on appeal, the revocation of probation will remain on his criminal record. If defendant is convicted of another offense within the next ten years, his record will establish that defendant "has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation." The majority posits a distinction between a defendant whose probation was revoked and one who is found to be in willful violation of probation. This proposed distinction is meaningless, given that a defendant's probation may not be revoked absent a finding of willful violation of the conditions

of probation. Defendant's exposure to the possibility of an aggravated sentence is clearly a collateral consequence of our failure to review his appeal.

Accordingly, I would vote to reach the merits of defendant's appeal and to vacate the revocation judgment. *See Black*, 197 N.C. App. at 377, 677 S.E.2d at 202 (recognizing that the judgment revoking the defendant's probation could be used as an aggravating factor in a subsequent sentencing hearing pursuant to subdivision 15A-1340.16(d)(12a)).

STATE OF NORTH CAROLINA
v.
MARCUS MARCEL SMITH, DEFENDANT

No. COA16-1229

Filed 15 August 2017

1. Search and Seizure—protective sweep—apartment rooms—immediately adjoining place of arrest

The trial court did not err in a possession of a firearm by a felon case by concluding officers had authority to conduct a protective sweep of all rooms in defendant's apartment where the sole purpose was to determine whether there were any other occupants in the apartment that could launch an attack on the officers. All of the rooms, including defendant's bedroom where a shotgun was found, were part of the space immediately adjoining the place of arrest.

2. Search and Seizure—motion to suppress—protective sweep—plain view doctrine—incriminating nature not immediately apparent

The trial court erred in a possession of a firearm by a felon case by denying defendant's motion to suppress a shotgun seized from defendant's apartment while officers executed arrest warrants issued for misdemeanor offenses. Although the officers had authority to conduct a protective sweep of the apartment, the seizure of the shotgun could not be justified under the plain view doctrine where the incriminating nature of the shotgun was not immediately apparent.

Judge ARROWOOD dissenting.

On certiorari review of judgment entered 12 April 2016 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adrian W. Dellinger, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

ELMORE, Judge.

Three police officers entered defendant's apartment to execute arrest warrants issued for misdemeanor offenses. While two officers made the in-home arrest, the other officer conducted a protective sweep of defendant's apartment, leading to the discovery and seizure of a stolen shotgun. Defendant moved to suppress the shotgun as evidence obtained through an unlawful search and seizure, arguing that the officer lacked authority to conduct the protective sweep, and the seizure could not be justified under the "plain view" doctrine. The trial court denied defendant's motion to suppress. After the ruling, defendant pleaded guilty to possession of a firearm by a felon and, pursuant to defendant's plea arrangement, the court dismissed the charge of possession of a stolen firearm.

We allowed defendant's petition for writ of certiorari to review the trial court's order denying his motion to suppress. Upon review, we hold that (1) the officer was authorized to conduct the protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found—were areas "immediately adjoining the place of arrest from which an attack could be immediately launched," *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 1098, 108 L. Ed. 2d 281, 286 (1990); and (2) because the officer lacked probable cause to believe that the shotgun was contraband "without conducting some further search of the object," " 'its incriminating nature [was not] immediately apparent' " and "the plain-view doctrine cannot justify its seizure," *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 345 (1993) (quoting *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 112, 123 (1990)) (citing *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)). Reversed.

I. Background

In January 2015, Officer Paier assumed a caseload of low-risk supervisees including defendant, who was on probation for impaired driving. During a routine absconder check, Officer Paier discovered outstanding arrest warrants against defendant for absconding probation and failing to appear at a scheduled court date. He verified defendant's current address and relayed the information to dispatch. Officer Joyce of the Kernersville Police Department assembled a squad, consisting of Officers Stokes, Ziglar, and Castle, to execute the arrest warrants.

On 1 April 2015, at approximately 11:00 p.m., the officers arrived at defendant's apartment complex. Officer Stokes staged with a K-9 in a back hallway of the multi-unit building, while the other officers approached the front door of defendant's unit. When Officer Joyce knocked, defendant opened the door cautiously, in his underwear, and confirmed his identity. Officers Ziglar and Castle entered the apartment and immediately placed defendant in custody as Officer Joyce, wearing a mounted body camera, conducted a protective sweep of the other rooms.

The front door of the apartment leads directly into the living room. The living room opens up on the back right corner, opposite the doorway, leading directly into the kitchen. A short hallway, spanning only a few feet, runs perpendicular in between the living room and the kitchen. The hallway is visible from the front door and more closely resembles the center of a four-way intersection, connecting every room inside the apartment: The living room and kitchen to the south, a bathroom to the east, an empty bedroom to the north, and defendant's bedroom to the west.

Officer Joyce stated that he conducted the sweep for the officers' safety, only searching areas where individuals might be hiding. During the sweep, he saw a shotgun leaned up against a wall in the entryway of defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. Officer Joyce walked past the shotgun to check defendant's bedroom, confirming there were no other occupants in the apartment. The entire sweep took less than two minutes.

After completing the sweep, Officer Joyce secured the shotgun "to have it in our control and also check to see if it was stolen." Once he confirmed the shotgun was unloaded, he carried it into the living room, where defendant stood near the front door, his hands cuffed behind his back, surrounded by Officers Ziglar and Castle. Officer Joyce placed the shotgun on a couch, used his flashlight to examine the receiver, and then turned over the shotgun to expose its serial number, which

he immediately called into Communications. When Communications reported the shotgun stolen, the officers seized the weapon.

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress. Our review of a trial court's denial of a suppression motion is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. The Protective Sweep

[1] Defendant first challenges the protective sweep of his apartment. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094, 108 L. Ed. 2d 276, 281 (1990), *cited in State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002). To be lawful, the sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281. In *Buie*, the U.S. Supreme Court articulated two scenarios in which police officers may conduct a protective sweep. First, incident to an arrest, officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286. Second, when an officer has "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger." *Id.*

The trial court concluded that the protective sweep of the apartment was valid under the first prong of *Buie*. Defendant argues, however, that Officer Joyce was not authorized to conduct a protective sweep of the bedroom, where the shotgun was found, because the bedroom was not "immediately adjoining the place of arrest from which an attack could be immediately launched."

Our appellate courts have not specifically addressed which areas might qualify as "immediately adjoining the place of arrest," but decisions

from the federal courts are instructive. In *United States v. Lauter*, 57 F.3d 212 (2d Cir. 1995), the police executed an arrest warrant against the defendant in his small, basement apartment. *Id.* at 213. The apartment consisted of two small, adjacent rooms. *Id.* After arresting the defendant in the front room, the officers conducted a protective sweep of the back room, where they discovered a shotgun protruding from underneath a bed. *Id.* at 213–14. The defendant moved to suppress the shotgun, arguing that the protective sweep was impermissibly broad. *Id.* at 214, 216. Upholding the sweep under the first prong of *Buie*, the court reasoned that "the back room was 'immediately adjoining' the area in which [the defendant] was arrested," and the police action "was well within the scope of a permissible protective sweep, particularly in light of the small size of the apartment." *Id.* at 216–17 (citing *United States v. Robinson*, 775 F. Supp. 231, 235 (N.D. Ill. 1991)).

Likewise, in *United States v. Thomas*, 429 F.3d 282 (D.C. Cir. 2005), the defendant challenged the scope of a protective sweep inside his one-bedroom apartment. *Id.* at 286. The front door of the apartment opened immediately into a hallway, where the defendant was arrested. *Id.* at 284, 287. To the left was a living room, and to the right were "doorways off the hallway leading to the kitchen, bathroom, and bedroom." *Id.* at 284. The court concluded that the bedroom, fifteen feet from the apartment's entrance, was "immediately adjoining the place of arrest" because "every room swept 'could be immediately accessed from the hallway' " and "the entrance to the bedroom was a straight shot down the hallway from the spot where [the defendant] was arrested." *Id.* at 284–85, 287. Although the defendant maintained that the living room and front hallway were the only "immediately adjoining spaces," the court declined to define the concept so narrowly:

> The safety of the officers, not the percentage of the home searched, is the relevant criterion. . . . If an apartment is small enough that all of it "immediately adjoin[s] the place of arrest" and all of it constitutes a space or spaces "from which an attack could be immediately launched," . . . then the entire apartment is subject to a limited sweep of spaces where a person may be found.

Id. at 287–88 (alteration in original) (citations omitted) (quoting *Buie*, 494 U.S. at 327, 334, 110 S. Ct. at 1094, 1098, 108 L. Ed. 2d at 281, 286).

Guided by the foregoing decisions, we agree with the trial court's conclusion that Officer Joyce had authority to conduct a protective sweep of the rooms in the apartment. As the courts findings indicate, and as the video footage shows, defendant was in the living room when

Officers Ziglar and Castle entered and placed him in handcuffs. Officer Joyce proceeded, "without any significant delay or hesitation," to conduct a sweep of the remaining rooms "for the sole purpose of determining whether there were any other occupants in the apartment that could launch an attack on the officers." Every room in the apartment was connected by the short hallway, and the apartment was "small enough that a person hiding in any area outside of the living room could have rushed into the living room without any warning." Based on the size and layout of the apartment, the trial court properly concluded that "[a]ll of the rooms"—including defendant's bedroom where the shotgun was found—"were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched."

B. Seizure of the Shotgun

[2] Next, defendant challenges the seizure of the shotgun. The trial court denied defendant's motion to suppress because Officer Joyce was permitted to conduct "a quick protective sweep of the apartment and the shotgun was in plain view." Defendant argues that the seizure cannot be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. Relying on the U.S. Supreme Court's decision in *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), defendant also contends that Officer Joyce conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number.

Although warrantless searches are presumptively unreasonable, there are circumstances in which " 'police may seize evidence in plain view without a warrant.' " *Horton v. California*, 496 U.S. 128, 134, 110 S. Ct. 2301, 2306, 110 L. Ed. 2d 112, 121 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 2037, 29 L. Ed. 2d 564, 582 (1971)). The plain view doctrine allows an officer to seize evidence without a warrant if:

> (1) the officer views the evidence from a place where he has [a] legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself.

State v. Alexander, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014) (citing *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561–62 (2002)); *see also Horton*, 496 U.S. at 136–37, 110 S. Ct. at 2308, 110 L. Ed. 2d at 123; *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674, *cert. denied*,

525 U.S. 853, 119 S. Ct. 131, 142 L. Ed. 2d 106 (1998). The burden rests with "the State to establish all three prongs of the plain view doctrine." *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999).

The "immediately apparent" requirement is " 'satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.' " *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389–90 (1993) (quoting *State v. White*, 322 N.C. 770, 777, 370 S.E.2d 390, 395, *cert. denied*, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988)); *see also State v. Carter*, 200 N.C. App. 47, 54, 682 S.E.2d 416, 421 (2009). "Probable cause exists where the facts and circumstances within [the officer's] knowledge and of which [he] had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175–76, 69 S. Ct. 1302, 1310–11, 93 L. Ed. 1879, 1890 (1949) (citation omitted) (internal quotation marks omitted), *quoted in State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984). A seizure is valid only "when the objective facts known to the officer meet the standard required." *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982) (citations omitted); *see also Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 593, 160 L. Ed. 2d 537, 544 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the [ ] officer at the time . . . ." (citation omitted)). "If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object," then "its incriminating nature [is not] immediately apparent" and "the plain-view doctrine cannot justify its seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 345 (1993) (alteration in original) (citations omitted) (internal quotation marks omitted).

Observing the shotgun in plain view did not provide Officer Joyce with authority to seize the weapon permanently. The State's evidence at the suppression hearing failed to establish that, based on the objective facts known to him at the time, Officer Joyce had probable cause to believe the weapon was contraband or evidence of a crime. The officers were executing arrest warrants issued for misdemeanor offenses and were not aware that defendant was a convicted felon. Before the seizure, Officer Joyce asked the other officers in the apartment if defendant was a convicted felon, which they could not confirm. Officer Joyce testified that it was Officer Stokes who informed him of defendant's status, but Officer Stokes never entered the apartment, and Officer Joyce could not recall when he learned defendant was a convicted felon:

> [PROSECUTOR:] So at what point during this encounter—you know he's on probation. You've got him in custody. You see a shotgun in there which you're going to seize for protection reasons. But at what point did you also become suspicious that the defendant might be a convicted felon and not be allowed to possess that weapon because of his status as a felon or a probation—being on probation?
>
> [OFFICER JOYCE:] I believe Officer Stokes had that information stating that he was a felon. And at that—Officer Stokes, I believe, was the one that made me aware of that.
>
> [PROSECUTOR:] Okay. So at some point you made the determination that he was a convicted felon?
>
> [OFFICER JOYCE:] Correct.
>
> [PROSECUTOR:] All right. Do you know at what point that occurred in this, you know, scheme? You've got a lot going on. But at what point that occurred for you.
>
> [OFFICER JOYCE:] For me, I really—I really don't know. It may be before or it may be after. The only thing I remember was the gun was stolen.
>
> [PROSECUTOR:] How did you determine it was stolen?
>
> [OFFICER JOYCE:] I read the serial number to Communications, and they advised it was stolen out of Guilford County.

Defense counsel elicited the same testimony from Officer Joyce on cross-examination:

> [DEFENSE COUNSEL:] And I believe it was your testimony that you said Officer Stokes had the information about Mr. Smith having a felony conviction. Is that correct?
>
> [OFFICER JOYCE:] I believe—I believe it was Officer Stokes.
>
> . . . .
>
> [DEFENSE COUNSEL:] And would it surprise you that [Officer Stokes] said, during further investigation of Mr. Smith, it was then determined he was a previously convicted felon?
>
> [OFFICER JOYCE:] I knew at some point we found out he was a felon.

> [DEFENSE COUNSEL:] But it was your testimony you couldn't remember if it was before or after you seized the gun?
>
> [OFFICER JOYCE:] Correct. I just know the gun was stolen.

The dissent argues that, even if the officers did not know defendant had been convicted of a felony, they did know defendant was on probation for committing some offense. Thus, the dissent reasons, it was "immediately apparent that the shotgun was contraband" because a ban on possessing firearms is a "regular condition" of probation. But the law does not *require* a sentencing judge to impose the regular conditions of probation on every probationer. *See* N.C. Gen. Stat. § 15A-1343(b) (2015). And there is no evidence to suggest the officers knew the specific terms of defendant's probation, including whether the terms of defendant's probation prohibited him from possessing firearms, at any time during the warrant service.[1] The incriminating character of the shotgun became apparent only upon some further action by the officers.

When "unrelated to the objectives of the authorized intrusion," even the slight movement of an object, "which expose[s] to view [its] concealed portions," is impermissible. *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S. Ct. 1149, 1152, 94 L. Ed. 2d 347, 354 (1987). In *Hicks*, while searching for weapons in the defendant's apartment, one of the officers noticed two sets of expensive stereo equipment that "seemed out of place." *Id.* at 323, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353. Suspecting that the equipment was stolen, the officer maneuvered some of the stereo components to reveal their serial numbers, which he then read, recorded, and reported by phone to police headquarters. *Id.* When headquarters confirmed that the equipment was stolen, the officer seized it immediately. *Id.* The U.S. Supreme Court concluded that moving the equipment "constitute[d] a 'search' separate and apart from the search . . . that was the lawful objective of [the officer's] entry into the apartment." *Id.* at 324–25, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353–54. By taking action "unrelated to the objectives of the authorized intrusion," the officer "produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstances that validated the entry." *Id.* at 325, 107 S. Ct. at 1152, 94 L. Ed. 2d at 354. As to the reasonableness of the search, the Court held that it could not be justified under the plain view doctrine because the officer lacked probable cause: "A dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality

1. Defendant's probation officer was not present during the warrant service.

why application of the 'plain view' doctrine would supplant that requirement." *Id.* at 328, 107 S. Ct. at 1154, 94 L. Ed. 2d at 356.

As in *Hicks*, where the officer manipulated the stereo equipment to expose its serial number, here Officer Joyce took similar steps to uncover the serial number on the shotgun. After moving the weapon into the living room, he placed it on the couch, shined his flashlight on the receiver momentarily, and then turned the shotgun over to expose the serial number, which he immediately called into Communications. As *Hicks* instructs, such action constitutes a search, separate and apart from the lawful objective of the entry, even though it "uncovered nothing of any great personal value to [defendant]—serial numbers rather than . . . letters or photographs." *Hicks*, 480 U.S. at 325, 107 S. Ct. at 1152–53, 94 L. Ed. 2d at 354.

The search cannot be justified under the plain view doctrine because the shotgun's incriminating nature was not immediately apparent. There is no evidence in the record to indicate that Officer Joyce had probable cause—or even reasonable suspicion—to believe the shotgun was stolen. It was only after the unlawful search that he had reason to believe the shotgun was evidence of a crime. *See Graves*, 135 N.C. App. at 220, 519 S.E.2d at 773 (concluding that the State failed to present any evidence that the officer "recognized or even suspected that the brown paper wads contained contraband before he picked them up and before he unraveled them"); *cf. State v. Price*, 233 N.C. App. 386, 402, 757 S.E.2d 309, 319 (2014) (concluding that the "immediately apparent" requirement was met where the "defendant, while holding his rifle, admitted that he was a convicted felon"); *United States v. Malachesen*, 597 F.2d 1232, 1234–35 (8th Cir. 1979) (concluding that a pistol, seized temporarily for the officers' safety, became contraband subject to seizure when an officer learned from two other detectives searching the premises that the defendant had a prior felony conviction).

III. Conclusion

Although Officer Joyce had authority to conduct a protective sweep of the apartment, the seizure of the shotgun cannot be justified under the plain view doctrine. Based on the evidence presented at the suppression hearing, the State failed to show that the incriminating nature of the shotgun was immediately apparent. Because the shotgun is evidence obtained through an unlawful search and seizure, the trial court erred in denying defendant's motion to suppress.

REVERSED.

Judge DIETZ concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I agree with the majority that the sweep of the defendant's apartment was lawful. However, I disagreee that the warrantless seizure of the shotgun in plain view was unlawful. For that reason, I respectfully dissent.

As the majority points out,

> [u]nder the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself.

State v. Alexander, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014). The majority opinion establishes that the first and third prongs of the test are satisfied. Therefore, the sole issue to be determined is whether the second prong of the test is satisfied.

The majority concludes that the incriminating nature of the shotgun was not immediately apparent because (1) the State's evidence failed to establish that Officer Joyce knew defendant was a convicted felon at the time he seized the shotgun; and (2) Officer Joyce did not know the shotgun was stolen until a further search of the shotgun. While the majority's analysis is not incorrect, I conclude that regardless of whether Officer Joyce knew that defendant was a felon or knew that the shotgun was stolen, it was immediately apparent that the shotgun was contraband.

Contraband includes "[g]oods that are unlawful to . . . possess." *Black's Law Dictionary* 317 (7th ed. 1999). On 4 April 2012, defendant was placed on supervised probation under the regular terms and conditions of probation. Pursuant to the provisions of N.C. Gen. Stat. § 15A-1343(b)(5) (2015), "[a]s a regular condition[] of probation, a defendant must . . . [p]ossess no firearm . . . ." Thus, under the regular terms and conditions of probation, the shotgun was contraband.

Given that the officers were serving a warrant for a probation violation, it was immediately apparent that the shotgun was contraband. Therefore, I would uphold the warrantless seizure of the shotgun under the plain view doctrine and affirm the trial court's order.

STATE v. VOLTZ

[255 N.C. App. 149 (2017)]

STATE OF NORTH CAROLINA
v.
PHILLIP VOLTZ, IV, DEFENDANT

No. COA16-1164

Filed 15 August 2017

1. Joinder—assault inflicting serious injury—second-degree sexual offense—assault by strangulation—felonious breaking or entering—intimidating a witness—exclusion of voir dire testimony—relevancy of evidence

The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by joining charges from 15 May 2015 and 2 January 2016 for a single trial even though defendant contended portions of a witness' voir dire testimony was improperly excluded and would have raised doubt as to whether defendant was the perpetrator of the crimes of breaking or entering and intimidating a witness. The testimony was not relevant to the 2 January 2016 charges and would have been inadmissible to suggest that another person committed them.

2. Jury—written jury instructions after oral instructions—felonious breaking or entering—no conflicting instructions

The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by providing the jury with written instructions on the charge of felonious breaking or entering that were similar to the trial court's earlier oral instructions. The jury requested a written copy and clarification upon certain points of law, and the trial court recognized a need to clarify the instructions.

3. Burglary and Unlawful Breaking or Entering—felonious breaking and entering instruction—no plain error

The trial court did not commit plain error by its instructions on felonious breaking and entering where defendant raised no objection to either the oral instruction or the written instruction, and in fact, affirmatively agreed to the clarification included in the written instruction on the felonious breaking or entering charge. Further, the jury did not need a formal definition of the term "assault" to understand its meaning and to apply that meaning to the evidence.

Appeal by defendant from judgments entered 2 September 2016 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart M. Saunders, for the State.

Richard Croutharmel for Defendant.

TYSON, Judge.

Phillip Voltz, IV ("Defendant") appeals from judgments entered after a jury found him guilty of assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness. We affirm in part, and find no plain error in part.

I. Background

Jessica Tony ("Tony") invited Defendant to the apartment she shared with B.A. and B.A.'s two-year-old daughter on the evening of 12 May 2015. Defendant brought a six-pack of beer with him. Tony, Defendant, and B.A. sat on the porch drinking and talking. Defendant and B.A. had not met prior to that evening. At around 12:30 a.m., B.A.'s daughter woke up and began to cry. Tony left to check on the child, and eventually fell asleep with her. When B.A. found Tony asleep, she told Defendant he needed to leave. Defendant responded he could not leave because he did not want to drive drunk, so B.A. told him he could sleep on the couch. B.A. retired to her bedroom.

As B.A. was preparing for bed, Defendant entered B.A.'s bedroom and informed her "that [they] were going to have sex." B.A. "told [Defendant] no," and Defendant pushed B.A. onto the bed, got on top of her, and choked her for a few seconds. Defendant forced B.A. to put her hands over her head, pulled off her shirt, ripped off her bra, and inserted his fingers into her vagina while choking her with one hand.

During a struggle, B.A. managed to fight off Defendant. B.A. then stood up on the bed, swung her right hand and hit Defendant in the eye, causing him to fall backwards. Defendant exclaimed "[l]ook what you did to my face," pulled B.A. down from the bed, threw her against the wall, and began to choke her again. B.A. was able to reach the bedroom door, open it, and push Defendant off of her. Defendant again grabbed B.A., and the pair fell to the floor in the doorway of the bedroom. The

struggle continued into the hallway, during which Defendant picked B.A. up by her legs and slammed her to the floor three times.

Hearing the commotion, Tony came out of her bedroom, screamed, and asked what was going on. Tony testified that B.A. "kept yelling that [Defendant] raped her[.]" B.A. testified she told Tony to call the police. B.A. eventually managed to get away from Defendant.

As B.A. explained at trial,

> I ran into the bar area of my kitchen and grabbed the hammer and told [Defendant] that he needed to get out, and so I followed at a safe distance behind him as he went out the door and then he turned around and grabbed the hammer away from me and slashed it at my arm and told me that he would see me again.

The police responded to the scene, but Defendant had left before they arrived. Defendant was indicted on 15 June 2015 on charges of assault inflicting serious injury, second-degree sexual offense, and assault by strangulation (collectively, the "13 May 2015 charges").

About eight months later, Kerissa Eller ("Eller"), B.A.'s neighbor, was washing dishes in her kitchen on 2 January 2016 when a man wielding a knife broke into her home. The man repeatedly asked "[w]here the f--k is [B.A.'s first name]?" Eller assumed the man meant B.A. Eller testified that after the man repeated the question a few times, he stopped, looked around, exclaimed "[o]h s--t," and ran out. Eller called the police. The police showed Eller a photographic lineup, which included a photo of Defendant, but Eller was unable to identify anyone in the lineup. Defendant was indicted on 7 March 2016 on charges of felony breaking or entering, felony stalking, and intimidating a witness (collectively, the "2 January 2016 charges").

Prior to trial, the State moved to join the 13 May 2015 and the 2 January 2016 charges for a single trial. Defense counsel objected to the motion. After considering arguments by Defendant and the State, the trial court ruled, "after hearing all the arguments and reviewing the case law," joinder "[was] proper in this matter[.]"

Defendant's trial began on 29 August 2016. During Eller's testimony, the trial court conducted *voir dire* to determine whether to admit portions of her testimony regarding B.A.'s character. In her *voir dire* testimony, Eller described B.A. as someone who created drama by, for example, "not keeping up with her dog." Eller further testified B.A. "always [had] . . . eight or nine cars in and out of [the apartment

complex] all day." Also during *voir dire*, the following colloquy occurred between Defendant's counsel and Eller:

> [Defendant's counsel:] And what kind of people do you see always going in and out of [B.A.'s] house?
>
> [Eller:] I don't really know how to describe it. It's just lots of cars, lots of black men mostly. And there is a couple white girls that come in and out a lot but they're always arguing with the people they're with too, so I just try to stay to myself.
>
> [Defendant's counsel:] So is it fair to say you see [B.A.] arguing a lot with the variety of people?
>
> [Eller:] Yes.

Eller further testified during *voir dire* that she had observed B.A. arguing with men in the yard outside of the apartment complex, and she could occasionally hear B.A. loudly arguing with men inside of B.A.'s apartment, which was a considerable distance away. Following *voir dire*, the trial court ruled that Eller's testimony would be limited to describing statements B.A. made to Eller about the events surrounding the alleged attack, but Eller was not permitted to testify about B.A.'s "propensity for violence" or about the "people coming in and out."

After all of the evidence was presented, the trial court instructed the jury regarding each of the charged offenses. With respect to the charge of felonious breaking or entering, the trial court gave the following oral instruction in open court:

> [Defendant] has been charged with felonious breaking or entering into another's building without her consent with the intent to commit a felony. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt.
>
> First, that there was either a breaking or an entry by [Defendant]. Coming into the apartment of [Eller], . . . with a knife would be a breaking or entering.
>
> Second, the State must prove that it was a building that was broken into or entered.
>
> Third, that the tenant did not consent to the breaking or entering.

> And forth, that at the time of the breaking or entering the defendant intended to commit *the felony of assault*.

(emphasis added). The trial court further instructed the jury if it found "from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] broke into or entered a building without the consent of the tenant, intending at that time to commit *a felony of assault*," it would be the jury's duty "to return a verdict of guilty of felonious breaking or entering."

After the trial court had fully instructed the jury as to all offenses, the jury began deliberations. The next morning, and outside the presence of the jury, the trial judge stated that he "want[ed] to mention something . . . that [he] added" to the jury instruction on felonious breaking or entering. With regard to the fourth element of felonious breaking or entering, the trial court judge explained:

> At the time of the breaking or entering [Defendant] intended to commit the felony of felonious assault. That was what I read to [the jury]. The footnote after that [in the pattern jury instructions] says that the crime -- the crime that [Defendant] allegedly intended to commit should be briefly defined. Failure to define the crime may constitute reversal [sic] error.

The trial judge stated it was his intention to provide the jury with alternate jury instructions that defined felony assault. Both the State and Defendant's counsel reviewed the proposed alternate instructions, and each agreed to them.

When the jury was present in the courtroom, the trial judge told the jury the following:

> I've prepared for you sort of at your request a copy of everything that I read to you – all yesterday. . . . [I]t's the whole charge from the beginning to end. . . . [Y]ou said you wanted the law yesterday afternoon, and I read it to you, but overnight I had time to fix the whole thing that I read to you from beginning to end. So I'm going to give you a copy of what's called the judge's charge, just one copy. *But it's everything I read to you from beginning to end, okay?* . . . I'm exercising the [c]ourt's discretion to give you a written copy of the charge, the oral charge, that I read to you yesterday afternoon, okay? So you'll have a written copy of that with you in the jury room.

(emphasis supplied). The written copy of the jury instructions given to the jury was identical to the oral instructions given the previous day, quoted above, but replaced the fourth element of the charge of breaking or entering with the following:

> And Fourth, that at the time of breaking or entering, [Defendant] intended to commit the felony of felonious assault. A felony assault would be Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury. Or an attempt to commit Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury.

(emphasis omitted). The jury then resumed deliberations.

Defendant was convicted of assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness, but was acquitted on the charge of felonious stalking. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) granting the State's motion for joinder of the two separate sets of charges; and (2) providing the jury with written jury instructions on the charge of felonious breaking or entering that materially differed from the trial court's earlier oral instructions.

IV. Joinder of Offenses

[1] Defendant argues the trial court erred by allowing joinder of the 15 May 2015 and 2 January 2016 charges. "Whether joinder of offenses is permissible under [N.C. Gen. Stat. § 15A-926(a)] is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial." *State v. Wilson*, 108 N.C. App. 575, 582, 424 S.E.2d 454, 458 (1993).

Defendant argues that portions of Eller's *voir dire* testimony at trial was inadmissible character evidence as to the 13 May 2015 charges, but was essential testimony for the 2 January 2016 charges. Defendant asserts, had Eller's testimony regarding B.A.'s arguments with "lots of black men" been admitted, that testimony would have raised doubt whether Defendant was the perpetrator of the crimes of breaking or entering and intimidating a witness.

Defendant argues the identity of the person who broke into Eller's apartment was at issue because Eller was not able to identify Defendant's photo in a lineup, and that "it was likely any number of other black men with whom B.A. had a volatile relationship with" could have mistakenly broken into Eller's apartment looking for B.A. Because the trial court did not allow the admission of this testimony, Defendant argues, he was denied the opportunity to create reasonable doubt in the jurors' minds and, therefore, the trial court erred in joining the two sets of charges for trial. *See State v. Huff*, 325 N.C. 1, 23, 381 S.E.2d 635, 647 (1989) ("If consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated." (citations omitted)), *vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990).

Eller's *voir dire* testimony was not relevant to the 2 January 2016 charges and would have been inadmissible to suggest that another person committed them. "[W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant." *State v. May*, 354 N.C. 172, 176, 552 S.E.2d 151, 154 (2001) (citation omitted). "Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt." *Id.* (citation omitted). Evidence that tends to show "nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded." *State v. Brewer*, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (citation omitted).

In the present case, Eller's *voir dire* testimony, that B.A. had "lots of black men" as visitors to her apartment, and she had frequent disagreements with those visitors, fails to point to any specific person, who may have committed the 2 January 2016 offenses. Rather, Eller's testimony would be sheer speculation of the identity of another pool of suspects with whom she had disagreements, and this testimony does not show that any person other than Defendant "actually did commit the offense and that therefore [Defendant] did not do so[.]" *Id.*

Further, Eller's testimony was not inconsistent with Defendant's guilt, as required to be admissible under our Supreme Court's decision in *May*. Whomever B.A. chose to have as visitors to her apartment, and the volatility, if any, of her relationship with those visitors is not connected to the State's theory that Defendant mistakenly broke into Eller's home brandishing a deadly weapon while looking for B.A. Eller's testimony was not inconsistent with Defendant's guilt and "too remote to be

relevant." *Id.* The trial court did not err in excluding Eller's testimony concerning the 2 January 2016 charges. Defendant has failed to show error in joining the 15 May 2015 and 2 January 2016 charges on that basis. Defendant's arguments are overruled.

V. Jury Instructions

[2] Defendant argues the trial court erred by providing the jury with written jury instructions on the charge of felonious breaking or entering, which conflicted and materially differed from the trial court's earlier oral instructions. Defendant further argues the trial court plainly erred by failing to define "the felony of assault." We disagree.

A. General Standard of Review for Jury Instructions

"Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted). "This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]" *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citation omitted).

Generally, "an error in jury instructions is prejudicial and requires a new trial *only if* there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (emphasis supplied) (citations and internal quotation marks omitted).

B. Conflicting Instructions upon a Material Point

Our courts have recognized the principle in criminal and civil cases, "that when there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and incorrect charge." *State v. Carver*, 286 N.C. 179, 183, 209 S.E.2d 785, 788 (1974); *see State v. Pope*, 163 N.C. App. 486, 490-91, 593 S.E.2d 813, 817 (2004) ("It is true that [a]n erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated." (citations and internal quotation marks omitted)); *Jones v. Morris*, 42 N.C. App. 10, 13, 255 S.E.2d 619, 621 (1979). In order to demonstrate prejudice, the appealing party must show both that the instructions conflicted and varied on a material point(s). *See, e.g.*, *Jones*, 42 N.C. App. at 13, 255 S.E.2d at 621.

This principal *only* applies where the instructions are *conflicting* and the conflict impacts material points. *State v. Stevenson*, 327 N.C. 259, 265, 393 S.E.2d 527, 530 (1990). Where the instructions are "not internally contradictory, but [were], at most, incomplete at one important point," the instructions are not conflicting such that a new trial is automatically required. *Id.* at 266, 393 S.E.2d at 530 (holding instructions were not conflicting where the court initially properly instructed on the elements of first-degree murder, but later omitted an element in the final mandate).

Our Supreme Court has held no conflicting instructions occurred where "the complaint [was] not of two inconsistent statements of the law," and any "confusion, assuming it to exist, was completely clarified in the other portions of the charge." *State v. Schultz*, 294 N.C. 281, 284-85, 240 S.E.2d 451, 454 (1978); *see also State v. Roseboro*, 344 N.C. 364, 378, 474 S.E.2d 314, 321-322 (1996) (holding the omission of an element of larceny in the body of the jury charge "did not create internally contradictory instructions," because the final jury mandate included all elements of larceny).

Here, the trial court's initial oral instructions to the jury on the charge of felonious breaking and entering stated, in part, "that at the time of the breaking or entering the defendant intended to commit the felony of assault." After deliberations commenced, the jury foreman submitted a question to the trial court requesting "copies of the laws[,] what the judge read," and specifically asked for clarification on what constitutes a second degree sexual offense and serious injury. That evening the trial court orally re-instructed the jury on the second degree sex offense and serious injury. The trial court further indicated, based upon the jury's request, he was inclined to give a copy of the entire charge to the jury the next morning.

The next morning, outside the presence of the jury, the trial judge noted to counsel that he wanted to add to the definition of "the felony of assault" in the felonious breaking and entering instruction in the written instructions to be given to the jury. The trial judge gave each attorney a copy of the suggested additional language. Each attorney expressly agreed to the additional instructions and stated no objection.

The written copy of the jury instructions as delivered stated, in part:

> And Fourth, that at the time of breaking or entering, [Defendant] intended to commit the felony of felonious assault. A felony assault would be Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury.

> Or an attempt to commit Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury. (emphasis omitted).

Defendant contends the trial court's oral and written instructions contain conflicting language to warrant a new trial. We disagree. The instructions were "not internally contradictory, but [were], at most incomplete at one important point." *Stevenson*, 327 N.C. at 266, 393 S.E.2d at 530; *Roseboro*, 344 N.C. at 378, 474 S.E.2d at 321-322. Recognizing the oral instruction *may* have been insufficient, the trial court provided the additional language contained in the written instructions, simply to further define "the felony of assault," to clarify the fourth element of felony breaking and entering.

The trial court may clarify its instructions where and after the trial court recognizes the original instructions may have been confusing, or where the jury requests clarifying or additional instructions on a charge. *See State v. Harris*, 315 N.C. 556, 563, 340 S.E.2d 383, 388 (1986); *State v. Rogers*, 299 N.C. 597, 603-05, 264 S.E.2d 89, 93-94 (1980).

Defendant cannot materially distinguish the cases cited by the State, which allow the trial court to clarify the oral instructions either upon the request of counsel, the jury, or upon the trial court's own realization of potential error. *Harris*, 315 N.C. at 563, 340 S.E.2d at 388; *Rogers*, 299 N.C. at 603-05, 264 S.E.2d at 93-94.

Defendant asserts the trial court did not explicitly mention the change in the felonious breaking and entering instruction to the jury. This argument ignores the fact that "[o]ur system of trial by jury is 'based upon the assumption that the trial jurors are men [and women] of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.' " *State v. King*, 343 N.C. 29, 45, 468 S.E.2d 232, 242 (1996) (quoting *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938)).

The jury requested a written copy of instructions and clarification upon certain points of law. The trial court recognized a need to clarify the instructions of the felonious breaking and entering charge. The attorneys for both parties had an opportunity to review the written instructions and both counsel approved the additional language. Once the written instructions were given to the jurors, there was no objection and no requests from either counsel or the jury for further clarification. Based upon the record before us, Defendant has failed to show that any differences between the trial court's oral and written instructions rise to the level of "conflicting instructions" to the jury "upon a material point" to warrant a new trial. *Carver*, 286 N.C. at 183, 209 S.E.2d at 788.

C. Plain Error Analysis

[3] Because the jury instructions were not conflicting on a material point to award Defendant a new trial, we address whether the trial court's instructions on felonious breaking and entering constitute plain error.

1. Standard of Review

When a defendant fails to object to the jury instructions, this Court reviews for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); N.C. R. App. 10(a)(2). To demonstrate plain error, the appealing party must not only show an error occurred in the jury instruction, but also must show prejudice and "that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *see also State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (holding the error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached").

Only in rare cases will improper instructions "justify reversal of a criminal conviction when no objection has been made in the trial court" to award a new trial. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

Defendant raised no objection to either the oral instruction or the written instruction, and, in fact, affirmatively agreed to the clarification included in the written instruction on the felonious breaking or entering charge. As such, our review is limited to plain error of any alleged error in the jury instructions

2. Analysis

Defendant was charged with felonious breaking or entering. The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2015); *State v. Litchford*, 78 N.C. App. 722, 338 S.E.2d 575 (1986) (holding the trial court did not plainly error by omitting the third element of felonious breaking or entering in its final mandate to the jury where the previous instructions included all essential elements of the charge).

Here, the trial court announced he intended to add clarifying language in the written jury instructions based upon review of a footnote in the North Carolina Pattern Jury Instruction for felonious breaking or entering. This footnote states "[t]he crime that [defendant] allegedly intended

to commit should be briefly defined. Failure to define the crime *may* constitute reversible error." N.C.P.I. Crim. 214.30 (emphasis supplied).

It is true that the failure of the trial court to define the crime that the defendant allegedly intended to commit *may* be reversible error. *Compare State v. Foust*, 40 N.C. App. 71, 71, 251 S.E.2d 893, 894 (1979); *State v. Elliot*, 21 N.C. App. 555, 556, 205 S.E.2d 106, 107 (1974); *with State v. Simpson*, 299 N.C. 377, 383, 261 S.E.2d 661, 664 (1980); *State v. Lucas*, 234 N.C. App. 247, 257-58, 758 S.E.2d 672, 679-80 (2014). However, our Supreme Court in *Simpson* limited its previous holdings. *Simpson*, 299 N.C. at 382, 261 S.E.2d at 664.

In *Simpson*, the defendant was charged with burglary in the first degree, which like felonious breaking or entering, requires the defendant to have the intent to commit a felony. *Id.* In the instructions to the jury, the trial court noted "the defendant intended to commit larceny" but did not further define what constitutes a larceny for the jury. *Id.* at 382-83, 261 S.E.2d at 664. The Supreme Court stated "[a]ssuming *arguendo* that the court's failure to define larceny was erroneous, . . . we hold that such failure was not prejudicial on the facts of this case." *Id.* at 383, 261 S.E.2d at 664.

The Court explained:

> Defendant was on trial for burglary—not larceny. Intent to commit larceny is the *felonious intent* supporting the charge of burglary. In this context, the court in defining felonious intent used the word "larceny" as a shorthand statement of its definition, *i.e.*, to steal, take and carry away the goods of another with the intent to deprive the owner of his goods permanently and to convert same to the use of the taker. In the instant case, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence. The use of the word "larceny" as it is commonly used and understood by the general public was sufficient in this case to define for the jury the requisite felonious intent needed to support a conviction of burglary. There is no reasonable possibility that failure to define "larceny" contributed to defendant's conviction or that a different result would have likely ensued had the word been defined.

Id. at 383-84, 264 S.E.2d at 665; *see also Lucas*, 234 N.C. App. at 247, 758 S.E.2d at 672 (holding the failure to further define larceny did not constitute plain error based upon the Supreme Court's ruling in *Simpson*.).

In this case, after realizing the oral instruction on felonious breaking or entering may not have been sufficient, the trial court further defined what constituted a felonious assault in the written instructions given to the jury. Presuming, *arguendo*, the trial court erred in its charge to the jury on felonious breaking or entering, under plain error review, Defendant has not shown prejudice or that the error was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251.

The felonious breaking and entering charge was based upon evidence that Defendant entered Eller's home on 2 January 2016. Eller lived in the duplex next door to B.A. Eller and a police officer testified concerning the event. The evidence tends to show that, Eller had just put her baby down and was washing dishes when a man burst through her door. The man was holding a knife. He began cursing at Eller, and said, "where the f-–k is [B.A.]?" Eller testified the man "was really close to [her] daughter, so [she] was freaking out" and scared "because [she] couldn't get to her [daughter] before he could." Eller testified after asking where B.A. was several times, the man then stopped, looked around, said "[o]h, s--t," and ran out the door.

Eller called 911. When the police arrived she described the man as thin, black, with long dreadlocks and a mark she believed was under his left eye. She testified the man was wearing a blue jersey. The police showed Eller a lineup, which included a photo of Defendant, but she was unable to identify anyone.

Defendant was not charged with assault, but with felonious breaking or entering with intent to commit an assault therein. Based upon the evidence presented and under plain error review, we are "satisfied that 'the jury did not need a formal definition of the term [assault] to understand its meaning and to apply that meaning to the evidence.' " *Lucas*, 234 N.C. App. at 257, 758 S.E.2d at 679 (quoting *Simpson*, 299 N.C. at 384, 261 S.E.2d at 665).

The primary purpose of a charge is to aid the jury in arriving at a correct verdict according to law. *Lewis v. Watson*, 229 N.C. 20, 47 S.E.2d 484 (1948). "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved." *State v. Friddl*e, 223 N.C. 258, 261, 25 S.E.2d 751, 753 (1943). The trial court's charge on felonious breaking or entering was sufficient to enable the

jury, in its deliberations, to arrive at a verdict with a correct understanding of the law relative to this charge. *See Simpson*, 299 N.C. at 383, 261 S.E.2d at 664.

VI. Conclusion

For the reasons stated, the trial court did not err in joining the 15 May 2015 and 2 January 2016 charges for a single trial. That portion of the trial court's order is affirmed. We do not find a conflict upon a material point exists in trial court's oral and written instructions such that Defendant is entitled to a new trial.

Defendant has failed to demonstrate the court committed plain error in the instructions to the jury on felonious breaking and entering. We affirm in part, and find no plain error in part. *It is so ordered.*

AFFIRMED IN PART; NO PLAIN ERROR IN PART.

Chief Judge McGEE and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
JAMES ERIC WEST, DEFENDANT

No. COA16-918

Filed 15 August 2017

Evidence—second-degree sexual offense—denial of cross-examination—prosecuting witness's sexual history—Rape Shield law—Rule 403

The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's cross-examination of a prosecuting witness regarding his admission of sexually assaulting his sister when he was a child where it occurred more than a decade earlier and involved no factual elements similar to the underlying charge. The evidence of prior sexual behavior was protected by the Rape Shield law under N.C.G.S. § 8C-1, Rule 412 and the probative value of the evidence of the witness's sexual history was substantially outweighed by its potential for unfair prejudice under N.C.G.S. § 8C-1, Rule 403.

STATE v. WEST

[255 N.C. App. 162 (2017)]

Appeal by Defendant from judgment entered 9 June 2016 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert M. Curran, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

When a trial court properly determines, pursuant to Rule 403 of the North Carolina Rules of Evidence, that the probative value of evidence about a prosecuting witness's sexual history is substantially outweighed by its potential for unfair prejudice, the trial court does not err by excluding the evidence, regardless of whether it falls within the scope of the North Carolina Rape Shield law.

James Eric West ("Defendant") appeals from judgment entered against him following a jury conviction finding him guilty of second degree sexual offense. Defendant argues the trial court erred by denying his ability to cross-examine the prosecuting witness regarding his admitted commission of a sexual assault when he was a child. After careful review, we conclude the exclusion was not error.

Factual and Procedural History

The evidence at trial tended to show the following:

On 26 December 2014, Defendant and D.S.[1] were living at the Durham Rescue Mission. Defendant, age 48 at the time of the incident, had been working on the maintenance crew, and D.S., age 20 at the time of the incident, approached him to discuss joining the crew. D.S. spoke with Defendant about his background, including his childhood. D.S. told Defendant that he had been removed from his biological family around the age of three to five after being sexually abused by his brother. Defendant asked D.S. if he was a virgin, and D.S. responded that he was.

Later that evening, after dinner, D.S. and Defendant met in a maintenance shed at the Mission. D.S. was lying down suffering from a headache when Defendant pulled down D.S.'s pants and performed unwanted oral sex on him. D.S. tried without success to rebuff Defendant's advances.

1. To preserve the privacy of the victim of a sexual assault, we hereinafter refer to him as D.S. *See State v. Gordon*, __ N.C. App. __, __ n.1, 789 S.E.2d 659, 661 n.1 (2016).

After the sexual assault ended, Defendant told D.S. not to report what happened.

D.S. and Defendant left the maintenance shed and walked in different directions; D.S. went to his dorm room and reported the incident to a roommate. Police were called to investigate and D.S. recounted the incident. D.S. also told one officer that he had been sexually abused around the age of three to five by his brother and was removed from his home. D.S. told another officer that he had sexually assaulted his half-sister when he was around eight or nine years old and was thereafter placed in a facility until he reached eighteen years of age.

Officers informed Defendant that D.S. had accused him of forcing unwanted oral sex upon him. Defendant denied the allegations and consented to a cheek swab to test his DNA. Forensic analysis found a presence of Defendant's DNA in a penile swab from D.S.

Defendant was indicted on 4 May 2015 on one count of second degree kidnapping and one count of second degree sexual offense. In a pre-trial hearing, the State, *inter alia*, dismissed the second degree kidnapping charge and moved to exclude or limit evidence of D.S.'s sexual history, specifically, D.S.'s statements to police that he had sexually assaulted his half-sister when he was younger. Defense counsel asserted that the statement was admissible for impeachment because it was inconsistent with D.S.'s previous statements to police about how and when he was removed from his home as a child. The trial court tentatively limited defense counsel to questions about D.S.'s inconsistent statements to police, but ruled defense counsel would not be allowed to question D.S. about the prior sexual assault or D.S.'s statement to police about the prior assault.

Following D.S.'s direct testimony, the trial court held an *in camera* hearing to settle the issue about the admissibility of D.S.'s sexual history. After *voir dire* testimony from D.S. and arguments of counsel, the trial court ruled that D.S.'s statement about sexually assaulting his sister was evidence of prior sexual behavior protected by the Rape Shield law and was also inadmissible because any probative value was substantially outweighed by the likelihood of unfair prejudice and confusion of the jury. On cross-examination, defense counsel obtained D.S.'s admission that he had told one police officer that he was removed from the family home "at or near birth due to sexual abuse" and had told another officer that he was taken from the family home at age eight or nine.

On 3 June 2016, the jury returned a verdict finding Defendant guilty of second degree sexual offense. The trial court entered judgment and

sentenced Defendant in the mitigated range for a Class C felony with a prior record level one offender, to a minimum of 44 months and a maximum of 113 months. The trial court also ordered Defendant to register as a sex offender for 30 years.

Defendant timely appealed.

Analysis

Defendant argues that a prior sexual assault committed by a prosecuting witness is not protected by North Carolina's Rape Shield law and should therefore not have been excluded pursuant to Rule 412 of the North Carolina Rules of Evidence. We need not address this issue, because the trial court properly excluded the evidence based upon Rule 403 after evaluating its relevancy and balancing its probative value against its potential for unfair prejudice.

1. Standard of Review

We review a trial court's decision to exclude evidence pursuant to Rule 403 for abuse of discretion. *State v. Lloyd*, 354 N.C. 76, 108, 552 S.E.2d 596, 619 (2001) ("The decision whether to exclude relevant evidence under Rule 403 lies within the sound discretion of the trial court, and its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." (internal quotation marks and citations omitted)).

2. Evidence of Prior Sexual Conduct

Rule 412 of the North Carolina Rules of Evidence—North Carolina's Rape Shield law—provides in pertinent part:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> > (1) Was between the complainant and the defendant; or
> >
> > (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
> >
> > (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant

> as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-1, Rule 412 (2015). Our Supreme Court has held that North Carolina's Rape Shield law is "nothing more then [sic] than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980). North Carolina's previous Rape Shield law, and subsequently Rule 412, "was not intended to act as a barricade against evidence which is used to prove issues common to all trials." *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1981). Nor was is it meant to be the "sole gauge for determining whether evidence is admissible in rape cases." *Id.* at 698, 295 S.E.2d at 456.

When a defendant in a rape case seeks to admit evidence regarding a prosecuting witness's prior sexual conduct, and that evidence does not fall within an enumerated exception of Rule 412, the evidence is not *per se* inadmissible. *State v. Martin*, 241 N.C. App. 602, 610, 774 S.E.2d 330, 336 (2015). Rather, a trial court should "look[] beyond the four categories to determine whether the evidence was, in fact, relevant . . . and, if so, conduct a balancing test of the probative and prejudicial value of the evidence under Rule 403 . . . ." *Id.* at 610, 774 S.E.2d at 336 (citations omitted).

Evidence of prior sexual conduct is relevant when it affects an issue that is common to all trials, *e.g.*, a witness's inconsistent statement about his or her sexual history. *Younger*, 306 N.C. at 697, 295 S.E.2d at 456 ("Inconsistent statements are, without a doubt, an issue common to all trials."). Rule 403 of the North Carolina Rules of Evidence permits a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403. A proper determination of the probative and prejudicial effect of certain evidence entails "an *in-camera* hearing in which the court can hear and evaluate the arguments of counsel before making a ruling." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456.

Here, when considering whether to admit the evidence of D.S.'s prior sexual conduct, the trial court properly held an *in camera* hearing. The trial court heard arguments from counsel and *voir dire* testimony from D.S. concerning his history. Following this testimony, the trial court concluded that "any probative value in [the evidence was] outweighed by the prejudicial value[, and would] . . . only serve to confuse the jury . . . ."

Our review of the record supports the trial court's exclusion of the evidence pursuant to Rule 403. The sexual behavior defense counsel sought to question D.S. about occurred more than a decade earlier, and involved no factual elements similar to the events underlying the charge for which Defendant was on trial. The evidence—an eight- or nine-year-old boy sexually assaulting his half-sister—is disturbing and highly prejudicial. When and why D.S. was taken from his family home as a child are facts of remote relevance to the offense charged. Other evidence presented by the State, including expert testimony that Defendant's DNA matched a genital swab taken from D.S. shortly after the alleged assault—despite Defendant's denial that any sexual encounter occurred—also rendered D.S.'s inconsistent statements about remote facts less relevant to the contested factual issues at trial.

Defendant argues that the trial court's exclusion of evidence concerning D.S.'s childhood sexual assault of his half-sister not only kept jurors from learning the conflicting details of D.S.'s statements about when and why he was taken from his home as a young child, but also kept jurors from hearing evidence that D.S. was not a virgin at the time of the alleged offense, contrary to his statement to Defendant that he was a virgin. This argument has been made in a previous case without success. In *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988), the Supreme Court upheld a trial court's ruling excluding evidence that the prosecuting witness was not a virgin:

> [T]he State did not ask, and the victim did not in fact testify, as to whether she was a virgin. On the contrary, the victim testified only to what defendant asked her and to what she told defendant in response to his question on the night of the crime. The State clearly elicited this testimony, not to establish before the jury whether the victim was a virgin, but to lay a proper foundation for the additional evidence of defendant's statement of his announced intent . . . .

Id. at 397-98, 364 S.E.2d at 345. Here, the State did not present D.S.'s statement to Defendant as evidence that D.S. was a virgin, but rather as evidence of the conversation between D.S. and Defendant preceding

the alleged sex offense to prove Defendant's knowledge and intent. The fact that Defendant asked D.S. if he was a virgin, regardless of D.S.'s response, was probative of Defendant's intent in meeting D.S. at the shed where the sexual offense occurred.

While the issue of a prosecuting witness's credibility is always relevant, the temporal remoteness of the sexual history and the relationship, or lack thereof, to the specific acts alleged in the trial, the remote relevance of the prosecuting witness's prior inconsistent statements, and the relative strength of other evidence unrelated to the prosecuting witness's credibility support the trial court's ruling that the low probative value of the evidence was substantially outweighed by its high potential for prejudice and confusion.

Conclusion

For the foregoing reasons, based upon the record evidence and the authorities cited, we affirm the trial court's determination to exclude evidence that the State's prosecuting witness committed a sexual assault when he was a child.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KWANISSDA WILLIAMS

No. COA16-1048

Filed 15 August 2017

1. Evidence—motion to suppress all evidence—officer stop—summary dismissal of motion—testimony not required—affidavit—reasonable suspicion

The trial court did not err in a resisting a law enforcement officer and assault inflicting serious bodily injury on a law enforcement officer case by failing to hear sworn testimony before denying defendant's motion to suppress all evidence obtained pursuant to an officer's stop. Testimony is only required under N.C.G.S. § 15A-977(d) if the trial court first determines it cannot dispose of the motion summarily. Further, defendant's affidavit gave rise to a reasonable

suspicion that she had been trespassing at a shelter, and that an officer detained her as the only means of ascertaining her identity for the purposes of "trespassing" her from the shelter.

2. Police Officers—resisting an officer—motion to dismiss—sufficiency of evidence—reasonable articulable suspicion—ascertaining identity of trespasser at shelter—discharging duty as an officer

The trial court did not err by denying defendant's motions to dismiss the charges of resisting an officer where an officer had a reasonable articulable suspicion to stop and detain defendant for trespassing at a shelter. The officer was discharging or attempting to discharge his duty as an officer at the time defendant resisted him.

3. Police Officers—assault inflicting serious bodily injury on a law enforcement officer—motion to dismiss—sufficiency of evidence—bite on arm—permanent or protracted condition causing extreme pain—serious permanent injury

The trial court erred by denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury on a law enforcement officer where the evidence was insufficient to support a finding that defendant's bite of an officer's arm resulted in a permanent or protracted condition that caused extreme pain, or caused serious permanent injury.

Appeal by Defendant from judgment entered 9 May 2016 by Judge Lisa C. Bell in Superior Court, Gaston County. Heard in the Court of Appeals 3 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Mary McCullers Reece for Defendant.

McGEE, Chief Judge.

Kwanissda Williams ("Defendant") appeals her convictions on charges of resisting a law enforcement officer ("resisting") and assault inflicting serious bodily injury on a law enforcement officer ("AISBI"). Defendant contends the trial court erred by denying her pretrial motion to suppress and her motions to dismiss. We hold that the trial court erred in denying Defendant's motion to dismiss the charge of AISBI, reverse, and remand for entry of judgment on assault of a law enforcement officer inflicting physical injury, but otherwise find no error.

I. *Background*

Officer Josh Smith ("Officer Smith") of the Gastonia Police Department was performing patrol duties on the evening of 11 June 2014. He received a "trespass call" from dispatch to respond to an incident at Power in the Word Ministries, a local homeless shelter ("the shelter") at approximately 9:45 p.m. The police dispatcher relayed that a woman "was refusing to leave the [shelter]."

When Officer Smith arrived at the shelter, he made contact with the woman who "was in charge that night" ("shelter representative").[1] The shelter representative "pointed out [Defendant], wh[o] was down the street," and told Officer Smith "that they wanted to trespass her."[2] Officer Smith testified:

> Usually when a business wants to trespass someone they'll want to make sure they have all their information, their name, date of birth, in case they want to – if they come back they can go obtain a warrant for trespassing, which is second-degree trespass. And a lot of times we'll go and we'll try and get that information.

The shelter representative identified Defendant as "Kwani," and Defendant was seen walking down the street away from the shelter.

Officer Smith pulled up alongside Defendant in his police vehicle, approximately 200 yards from the shelter, with the intent to investigate and potentially "trespass" Defendant from the shelter. Officer Smith "got out of [his vehicle], and began speaking with" Defendant. Officer Smith noticed that Defendant was "clearly agitated at the event," and seemed uncomfortable speaking with him. Officer Smith testified that Defendant was

> [p]acing back and forth, you know, when I was trying to speak with her she had her voice raised, agitated. I actually had to tell her, hey, come back and speak with me, you know, they are wanting to trespass you and I need to speak with you and get some information from you.

Officer Smith testified that, when he asked Defendant her name, she hesitated, but then stated that her name was "Brenda Smith," which conflicted with the name "Kwani" that had been provided by the shelter

1. Officer Smith did not remember the name of the woman in charge.

2. Officer Smith was not familiar with Defendant before this interaction.

representative. Officer Smith asked Defendant where she was from and again she hesitated, then said "Florida." Officer Smith testified that, based on his training and experience, he believed Defendant's hesitation and demeanor indicated she had given him false information, and he confronted Defendant about whether she had given him a false name. Officer Smith testified he informed Defendant that he needed to obtain her information in order to "trespass" her from the shelter and once she provided that information, she would be free to go.

Officer Smith testified Defendant became more agitated and began to walk away from him, back toward the shelter, yelling: "Jesus, Jesus." Officer Smith testified that he "requested another officer," and told Defendant "until I can positively identify you I'm going to detain you." Defendant responded by saying "f_ck you" to Officer Smith. At that point, Officer Smith requested that Defendant put her hands behind her back, saying: "I'm going to detain you until I figure out who you are." Officer Smith placed his hands on Defendant to begin putting her in handcuffs, but she pulled away from him and continued walking in the direction of the shelter. Officer Smith then informed Defendant she was under arrest for resisting a police officer, but Defendant continued to walk away from him. At this time, "[i]nstead of using anything [Officer Smith] decided just to take [Defendant] to the ground gently by just the leg sweep. [He] grabbed her about her shoulders, and . . . [placed his] foot, and . . . just guided her to the ground. And that's whe[n] the assault began."

Officer Smith and Defendant both landed on the pavement, with Officer Smith's arm next to Defendant's head. Officer Smith testified that, at that point, Defendant bit him in the middle of his left forearm and he experienced "instant . . . significant pain[,]" during which time Defendant was "tugging and pulling" on Officer Smith's arm so that he was "seeing the skin get stretched beyond what it usually gets stretched." However, the skin on Officer Smith's arm was not removed, and the muscle underneath was not exposed. Officer Smith began "to knee" Defendant and applied pressure to Defendant's jaw in order to get her to release her bite, which Defendant eventually did, but Defendant then bit Officer Smith's arm again. At that point, Officer Smith struck Defendant in her face with his elbow three times, which caused Defendant to release her bite. Officer Smith estimated the incident lasted thirty to forty-five seconds, and testified that no back-up arrived before the end of the incident. Once Officer Smith was able to break free from Defendant, he jumped on top of her, and "[a]t this point [his] secondary officers had showed up" and they were able to subdue Defendant.

Emergency Medical Services ("EMS") arrived at the scene. Officer Smith testified that his arm was red and bleeding from a wound about an "inch in circumference[.]" Officer Smith testified that, in addition to the bite mark, he sustained "a couple scratches . . . on the side of [his] face" that required no medical attention. Once EMS arrived at the scene, Officer Smith testified they "just disinfected [the bite wound], really." Officer Smith engaged in the following colloquy at trial:

> Q. Were you then directed to, by either EMS or your supervisor, to go to the hospital for treatment?
>
> A. Yes, ma'am.
>
> Q. Is that part of the standard procedure, or treatment procedure, or exposure procedure?
>
> A. Yes, ma'am.
>
> Q. And did you receive any further treatment at the hospital?
>
> A. Yes, ma'am. Any time we get exposed, whether it be needles, bites, stuff like that, we have go through a procedure through the hospital. They draw your blood initially to see if there's anything already there. They also do random drug testing. And while there I believe I got a Tetanus shot. And was basically sent home.
>
> Q. And did you go home or go back on duty?
>
> A. I went to the station in order to do paperwork.

Officer Smith's wound did not require stitches, but he was provided a prescription for a "prophylactic" and checked every three months for a nine-month period to insure he had not contracted any disease, which he did not. The following day, Officer Smith returned to work.

Photos taken "a day or so" after the incident were introduced into evidence and showed that Officer Smith's "forearm [was] swollen from the bite mark compared to [his] left. [He] believe[d] there [was] a second [photo] . . . comparing both [his] arms somewhere, maybe." Additional photographs of Officer Smith's injury were introduced, including one where he had "put some ointment on" the injury to facilitate healing, and that photo "show[ed] bruising to begin." Three days after the incident, Officer Smith took photographs of his injury that depicted "bruising of [his] entire forearm." Officer Smith took additional photographs over the next few weeks that showed "some healing" followed by the injury being

"scabbed over," and finally "the beginning scarring, and healing." Officer Smith testified the bite left a permanent "discoloration of [his] skin on [his] forearm . . . in the shape of a [one-inch diameter] bite mark."

Defendant was indicted on 7 July 2014 for assault on a law enforcement officer inflicting serious bodily injury and resisting, delaying, and obstructing a law enforcement officer. Defendant filed a pretrial motion to suppress all evidence obtained pursuant to the 11 June 2014 stop, arguing that Officer Smith lacked reasonable suspicion to detain her, which the trial court denied by order entered 13 April 2016. At trial, Defendant made a motion to dismiss at the close of the State's evidence and at the close of all the evidence, both of which the trial court denied.

A jury convicted Defendant on 15 April 2016 of resisting and AISBI. Defendant was sentenced to ten to twenty-one months' imprisonment. Defendant appeals.

II. *Motion to Suppress*

Defendant argues the trial court erred because it failed to hear sworn testimony before denying her motion to suppress as required by N.C. Gen. Stat. § 15A-977(d) (2015). We disagree.

A. Standard of Review

Defendant contends the trial court's error involved an error in interpreting N.C.G.S. § 15A-977(d). "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (citation and quotation marks omitted). "Under *de novo* review, this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *State v. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation omitted) (alteration in original).

B. Analysis

[1] N.C.G.S. § 15A-977 sets forth the requirements for a motion to suppress evidence in superior court. The motion must state the grounds upon which it is made and must be accompanied by an affidavit containing supporting facts. N.C.G.S. § 15A-977(a). The trial court may "summarily deny the motion to suppress evidence if:"

> (1) The motion does not allege a legal basis for the motion; or
>
> (2) The affidavit does not as a matter of law support the ground alleged.

N.C.G.S. § 15A-977(c). If the motion is not summarily determined, then the trial court must make a determination after a hearing, which must include testimony given under oath. N.C.G.S. § 15A-977(d). As our Supreme Court has noted, summary resolution of motions to suppress is encouraged:

> As we noted in *Holloway*, the official commentary to section 15A–977 explains that the statute "is structured 'to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion.' " Read in isolation, this language could suggest that the affidavit has some evidentiary purpose; however, the Court in *Holloway* omitted the following portion of the official commentary, which states:
>
> > [T]he State may file an answer denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given.
>
> . . . .
>
> Considered as a whole, the text of the statute and the official commentary make clear that the information presented in a section 15A–977(a) affidavit is *designed to assist the trial court in determining whether defendant's allegations merit a full suppression hearing. See* [N.C.G.S.] § 15A–977(c)(2) (stating that the trial court "may summarily deny the motion to suppress evidence if . . . [t]he affidavit does not as a matter of law support the ground alleged"). The statute does not say that the affidavit may be considered as evidence *at that hearing*. In contrast, the text of section 15A–977(d) states that the facts supporting the trial court's decision to grant or deny a defendant's suppression motion will be established at the suppression hearing on the basis of "testimony" given "under oath." In this respect, the section 15A–977(a) affidavit functions merely as a procedural prerequisite *to secure the summary granting, or avoid the summary denial, of the motion to suppress.*

State v. Salinas, 366 N.C. 119, 125–26, 729 S.E.2d 63, 67–68 (2012) (emphasis added) (citations omitted). The trial court is only required to

hear sworn testimony when it does not summarily decide a motion to suppress. N.C.G.S. § 15A-977(a)-(d).

Defendant filed her motion to suppress the morning of her trial, and the trial court heard arguments of counsel for both Defendant and the State. Defendant argued that Officer Smith's detention of Defendant was not an investigatory stop and, even if it was, it was not supported by reasonable suspicion. Neither Defendant nor the State requested to put on evidence; they simply argued why the law, as applied to the facts alleged, supported their differing positions. Therefore, the trial court did not hear any testimony before denying Defendant's motion.

Defendant argues the trial court's failure to hear sworn testimony before denying her motion to suppress resulted in insufficient competent evidence to support its ruling that the stop was lawful. Defendant's argument ignores the fact that testimony is only required if the trial court first determines it cannot dispose of the motion summarily. N.C.G.S. § 15A-977(a)-(d). We find that the trial court summarily denied Defendant's motion and, therefore, a full hearing with sworn testimony was not required.

In order for Officer Smith to lawfully detain Defendant to investigate an alleged second-degree trespass, there needed to have been evidence from which a reasonable officer in Officer Smith's position could articulate a reasonable suspicion that Defendant was in violation of the relevant part of the following statute:

> (a) Offense. – A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:
>
> > (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person[.]

N.C. Gen. Stat. § 14-159.13 (2015).

Though Defendant's affidavit in support of her motion to suppress could not have been used as substantive evidence had the trial court conducted a N.C.G.S. § 15A-977(d) suppression hearing, the trial court was *required* to considered Defendant's affidavit in support of her motion to suppress in order to determine whether to summarily deny her motion. *Salinas*, 366 N.C. at 125–26, 729 S.E.2d at 67–68. The affidavit in support of Defendant's motion to suppress included the following:

> 1. On Wednesday, June 11, 2014, just before 10 pm, a call for service was received related to a Civil Disturbance at [the shelter]. The caller alleged a female was refusing to leave the [shelter].
>
> 2. Officer [Smith] responded to the request and arrived at the location within 3 minutes[.]
>
> 3. According to Officer Smith, he first made contact at the [shelter], where he was advised the female had left the premises.
>
> 4. Officer Smith then drove down the street and located the female described in the call and identified by the [shelter representative] walking on foot, away from the [shelter.]
>
> 5. Officer Smith exited his patrol vehicle and told the female to come speak with him in reference to the alleged trespassing.
>
> 6. The female was [] Defendant[.]
>
> [Officer Smith spoke with Defendant, who then attempted to walk away from Officer Smith and questioned why he was asking for her identification. Officer Smith informed Defendant of the request to trespass her from the shelter.]
>
> . . . .
>
> 13. [Defendant] questioned the necessity of giving this information to Officer [Smith], and began to walk away again.
>
> 14. Officer Smith believed [Defendant] then gave the name "Brenda Smith," but he acknowledged he already knew [] Defendant [] to be "[Kw]ani" from the information provided by the [shelter] during his contact with them.
>
> 15. Officer Smith then accused [Defendant] of giving him a fake name and told [her] she [was] not free to leave and was being detained . . . so he could handcuff her while he ascertained her identity.

Defendant's affidavit clearly laid out alleged facts giving rise to a reasonable suspicion that Defendant had been trespassing at the shelter, and that Officer Smith detained Defendant as the only means of ascertaining her identity for the purposes of "trespassing" her from the shelter. Based upon the facts as set forth in Defendant's affidavit, Officer Smith's detention of Defendant was proper, and the trial court did not

err in dismissing Defendant's motion to suppress without a full suppression hearing. *Salinas*, 366 N.C. at 125, 729 S.E.2d at 67–68 ("[T]he information presented in a section 15A–977(a) affidavit is designed to assist the trial court in determining whether defendant's allegations merit a full suppression hearing. *See* [N.C.G.S.] § 15A–977(c)(2) (stating that the trial court 'may summarily deny the motion to suppress evidence if . . . [t]he affidavit does not as a matter of law support the ground alleged')."). The information presented in Defendant's N.C.G.S. § 15A-977(a) affidavit was sufficient to allow the trial court to determine that Defendant's allegations did not merit a full suppression hearing because Defendant's "affidavit d[id] not as a matter of law support the ground alleged" for suppression. N.C.G.S. § 15A-977(c)(2).

The fact that the trial court allowed the attorneys to argue did not convert the trial court's summary decision into a full N.C.G.S. § 15A-977(d) hearing. Arguments by counsel are not evidence and can, in this matter, be considered surplusage. *See State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (citation omitted) (" 'it is axiomatic that the arguments of counsel are not evidence' ").

Moreover, though the trial court was not required to make any findings of fact when it summarily denied Defendant's motion, to the extent that it did so, " 'irrelevant findings in a trial court's decision do not warrant a reversal of the trial court.' " *State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) (citations omitted). Pursuant to the foregoing, we hold the trial court's summary denial of Defendant's motion to suppress did not violate N.G.G.S. § 15A-977(d) and the trial court did not err in failing to hear sworn testimony before denying Defendant's motion.

III. *Motions to Dismiss*

Defendant argues the trial court erred in denying her motions to dismiss the charges of resisting and AISBI because the State failed to present sufficient evidence that Officer Smith was acting lawfully in discharging a duty of his office, and that the State failed to present sufficient evidence that Officer Smith incurred a serious bodily injury. We agree in part and disagree in part.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "The standard of review for a motion to dismiss in a criminal case is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein,

and (2) of defendant's being the perpetrator of such offense." *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted).

> The evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Burke, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

B. Analysis

1. *Resisting an Officer*

[2] The elements of obstruction or delay of an officer are as follows: (1) "the victim was a public officer;" (2) "the defendant knew or had reasonable grounds to believe that the victim was a public officer;" (3) "the victim was discharging or attempting to discharge a duty of his office;" (4) "the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office;" and (5) "the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

Defendant challenges the third element of obstruction of an officer, arguing that Officer Smith was not discharging a lawful duty at the time he stopped Defendant because Officer Smith did not have a reasonable, articulable suspicion that Defendant had committed a crime. Having held above that the trial court did not err in finding that Officer Smith had a reasonable articulable suspicion upon which to stop and detain Defendant, we further hold that Officer Smith was discharging or attempting to discharge his duty as an officer at the time Defendant resisted him. This argument is without merit.

2. *Assault Inflicting Serious Bodily Injury on an Officer*

[3] "[A] person is guilty of a Class F felony if the person assaults a law enforcement officer . . . while the officer is discharging or attempting to

discharge his or her official duties and inflicts serious bodily injury on the officer." N.C. Gen. Stat. § 14-34.7(a) (2015). "Serious bodily injury" is defined by statute as

> bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (2015).

To convict a defendant, there must be substantial evidence of the elements set forth in the jury instructions. *State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 524 (2009). Whether a "serious bodily injury" has occurred:

> depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

State v. Williams, 150 N.C. App. 497, 502, 563 S.E.2d 616, 619 (2002) (citation omitted). In the case before us, the trial court instructed the jury that "[s]erious bodily injury is an injury that creates or causes serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ." Because the trial court limited its instruction concerning serious bodily injury to the above, we do not consider any other potential definitions of "serious bodily injury." *See Id.* at 503, 563 S.E.2d at 620 ("we are limited to that part of the definition set forth in the trial court's instructions to the jury").

Further, the State agrees with Defendant that no evidence was presented showing permanent or protracted loss or impairment of a bodily member or organ. Because we agree with the State that no instruction on "permanent or protracted loss or impairment of the function of any bodily member or organ" was warranted, we consider only whether sufficient evidence supported a finding that Defendant's actions against Officer Smith resulted in a permanent or protracted condition causing extreme pain; or serious, permanent disfigurement.

a. Permanent or protracted condition that causes extreme pain

In *State v. Williams*, this Court considered whether the State presented sufficient evidence that a victim suffered serious bodily injury, defined by the trial court to the jury as "an injury that creates or causes a permanent or protracted condition that causes extreme pain." *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620. The victim in *Williams* suffered a broken jaw that was wired shut for two months, during which he lost thirty pounds, and the injury caused approximately $6,000.00 in damage to his teeth. *Id.* Evidence was also presented that the victim's ribs were broken and that he suffered continuing back spasms that affected his breathing and caused him to visit the emergency room twice. *Id.* Finally, a physician testified that the victim's injuries "would cause a person 'quite a bit' of pain and discomfort." *Id.* at 503-04, 563 S.E.2d at 620. Based on these facts, this Court held "a reasonable juror could find this evidence sufficient to conclude that [the victim's] injuries created a 'protracted condition that caused extreme pain' " and thus the trial court did not err in denying the defendant's motion to dismiss. *Id.* at 504, 563 S.E.2d at 620.

In the present case, the facts do not support a conclusion that Officer Smith suffered "a permanent or protracted condition that cause[d] extreme pain." *Id.* Unlike in *Williams*, no medical testimony was presented as to the painful or permanent effects of Officer Smith's injury, nor were the effects of his injury as clearly severe as in *Williams*. Officer Smith testified he experienced "instant . . . significant pain" when Defendant bit him, and that he "could actually feel and see the skin being pulled away from [his] muscle." Immediately afterwards, the bite injury was red and bleeding, and Officer Smith obtained medical attention, which involved disinfecting the wound and providing prophylactic medication, but did not require stitches or any other invasive medical treatment. After he was treated at the hospital, Officer Smith returned to the police station to complete paperwork, and was able to return to police work the next day. There was evidence that the bite caused swelling and bruising that apparently resolved in approximately one month's time, but there was no evidence that the injury continued to cause Officer Smith significant pain subsequent to his treatment at the hospital.

While the bite itself was no doubt painful, there was insufficient evidence presented to the jury that the bite resulted in a "permanent or protracted condition causing extreme pain." Officer Smith's experience is not analogous to the injuries in *Williams*. Officer Smith does not state that he continued to have significant pain; rather, he experienced swelling and bruising in the following days and weeks. Furthermore, Officer Smith's ability to leave the hospital and return to the police

station to complete paperwork, plus the fact that he returned to work the following day, demonstrates that his pain was not protracted, much less permanent. Thus, we find that the evidence in the present case was insufficient to support a finding that Defendant's bite resulted in "a permanent or protracted condition that cause[d] extreme pain." *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620.

We find the facts in the present case more analogous to a 2009 opinion, *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) ("*Williams II*").

> With respect to [the victim] M.L.W., the State's evidence tended to show that . . . defendant . . . hit M.L.W. so hard that she fell to the ground. Defendant began kicking M.L.W. in the ribs; then picked her up by her neck and squeezed while he swung her body. She passed out.

Id. at 182–83, 689 S.E.2d at 424. Based upon these facts, this Court held:

> While M.L.W. received a vicious beating, ... and her ribs were still "sore" five months after the assault, in order to meet the statutory definition, the victim must experience "extreme pain" in addition to the "protracted condition." N.C. Gen. Stat. § 14–32.4(a). The State presented no evidence of extreme pain. Therefore, the trial court erred in denying defendant's motion to dismiss the charge of an assault upon M.L.W. inflicting serious bodily injury, and we must reverse his conviction of that offense[.]

Id. at 184, 689 S.E.2d at 425 (citations omitted). While it may readily be inferred that the victim in *Williams II* suffered "extreme pain" during the course of the "vicious beating," this Court required something more than the pain obviously associated with the infliction of the injury itself. *Id.* We hold that, while Officer Smith received a vicious bite, the evidence does not show that Officer Smith continued to experience "extreme pain" in addition to any "protracted condition." *Id.*

b. Serious, permanent disfigurement

The State further argues that Officer Smith suffered serious, permanent disfigurement because a bite-mark shaped "discoloration" remained on his forearm approximately two years after the incident. In support, the State argues that " 'disfigurement' is defined as '[t]o mar or spoil the appearance or shape of.' " *State v. Downs*, 179 N.C. App. 860, 861-62, 635 S.E.2d 518, 519-520 (2006) (finding substantial evidence of serious permanent disfigurement where the victim suffered severe facial swelling, scalp abrasion, a fractured nose, and the loss of a tooth); *see*

also id. at 861-62, 635 S.E.2d at 520 ("the fact remains that [the victim] suffered the permanent loss of his own live, natural tooth"). The State further argues that this Court has found a "scar amounts to permanent disfigurement." *Williams II*, 201 N.C. App. at 169-170, 689 S.E.2d at 416 (finding one of the victims' injuries sufficient to conclude she suffered a serious bodily injury where she suffered a cracked pelvic bone, broken rib, torn ligaments in her back, and a deep cut over her left eye that never properly healed and left a scar).

The State contends that any lasting mark or scar should be considered sufficient evidence of serious bodily injury, but this reasoning would create a bright-line rule at odds with a jury's fact-based determination. As this Court has noted, "the element of 'serious bodily injury' requires proof of more severe injury than the element of 'serious injury[.]' " *State v. Hannah*, 149 N.C. App. 713, 719, 563 S.E.2d 1, 5 (2002). This Court further stated in *Hannah*:

> A review of the case law would suggest that our courts have found *serious injury* in situations that may not rise to the level of *serious bodily injury* as defined under N.C.G.S. § 14–32.4, for example: shards of glass in the arm and shoulder of a victim of a drive-by shooting into the victim's vehicles, coupled with an officer's observation that the victim was shaken, *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994); a bullet that pierced through the shoulder of the victim, creating two holes in his upper body, *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001); gunshot wound which resulted in multiple broken bones of the victim's arm, *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249 (2001); stab wound to the back and shoulder, *State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000); and a broken wrist, chewed fingers and a gash in the head, *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563.

Id. at 718, 563 S.E.2d at 5. While each case must be considered on its own facts, clearly, based upon the above cases, the presence of a minor scar or other mild disfigurement alone cannot be sufficient to support a finding of "serious bodily injury." *Id.*

Thus, it is necessary to analyze all of the facts presented, rather than just the discoloration on Officer Smith's forearm. As discussed previously, Officer Smith's injury was mild enough to allow him to return to the police station to complete paperwork that same night. Unlike the injuries in *Downs* and *Williams II*, the totality of Officer Smith's injuries

do not rise to "serious bodily injury" even though the incident resulted in a bite-shaped discoloration, or scar, on his forearm. Accordingly, the evidence as a whole was not sufficient to support a finding that Defendant's bite resulted in "serious permanent disfigurement."

Pursuant to the foregoing, we find there was insufficient evidence to support the "serious bodily injury" element. The trial court erred in denying Defendant's motion to dismiss the charge of assault on a law enforcement officer inflicting serious bodily injury, and we reverse that conviction. However, the jury was also instructed on the lesser-included offense of assault on a law enforcement officer inflicting physical injury.

> (c) Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class I felony if the person does any of the following:
>
> > (1) Assaults a law enforcement officer . . . while the officer is discharging or attempting to discharge his or her official duties and inflicts physical injury on the officer.
>
> . . . .
>
> For the purposes of this subsection, "physical injury" includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury.

N.C. Gen. Stat. § 14-34.7(c)(1). The jury clearly found that Officer Smith sustained a "physical injury" when it convicted Defendant of assault on a law enforcement officer inflicting serious bodily injury. We hold that the evidence supports this charge, and remand to the trial court for entry of a judgment as upon a verdict of guilty of assault on a law enforcement officer inflicting physical injury, and for resentencing. *See State v. Wilkins*, 208 N.C. App. 729, 733, 703 S.E.2d 807, 811 (2010).

IV. *Conclusion*

For the foregoing reasons, we find Defendant received a trial free from error on the charge of resisting an officer, but we reverse Defendant's conviction for assault on a law enforcement officer inflicting serious bodily injury, and remand for resentencing on the Class I felony charge of assault on a law enforcement officer inflicting physical injury.

NO ERROR IN PART; REVERSED IN PART, AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

STATE v. YISRAEL

[255 N.C. App. 184 (2017)]

STATE OF NORTH CAROLINA
v.
ASAIAH BEN YISRAEL

No. COA16-873

Filed 15 August 2017

1. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—quantity of drugs—admitted possession—surrounding circumstances—evidence recovered

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana based on only 10.88 grams of marijuana being recovered. Although the amount found on defendant's person and inside the vehicle's console might not be sufficient, standing alone, to support an inference that defendant intended to sell or deliver marijuana, defendant's admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient.

2. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—packaging of illegal drugs

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where an officer testified regarding the packaging of the three bags of 10.88 grams of marijuana into two larger plastic bags of remnant marijuana and one dime size bag of marijuana. The packaging and possession of both "sellable" and "unsellable" marijuana was evidence raising an inference that the jury could determine defendant had the intent to sell marijuana.

3. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—large quantity of unsourced cash

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where the uncontroverted evidence showed that defendant, twenty years old, was carrying a large amount of cash ($1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. Large amounts of cash on defendant's person supported an inference that he had the intent to sell or deliver.

4. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—stolen and loaded handgun in vehicle

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where a stolen and loaded handgun was also recovered from inside the glove compartment of a vehicle in addition to 10.88 grams of marijuana in the car. The Court of Appeals has previously recognized, as a practical matter, that firearms are frequently involved for protection in illegal drug trade. Further, neither our Supreme Court or Court of Appeals has ever recognized the Wilkins factors regarding packaging of the marijuana and cash recovered from defendant as exclusive for determining intent.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 13 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

TYSON, Judge.

Asaiah Ben Yisrael ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of possession with intent to sell or deliver marijuana. We find no error.

I. Background

Raleigh Police Officer Dennis Brandenburg was employed as the school resource officer at Enloe Magnet High School. On 30 October 2015 at approximately 10:00 a.m., Officer Brandenburg observed a white Chevrolet Impala vehicle pull into the front entrance of the school and illegally park in the fire lane. Officer Brandenburg recognized the vehicle as belonging to Malik Jones ("Jones"), a former Enloe student, who had previously been banned from the school's grounds for marijuana possession.

Officer Brandenburg believed Jones was driving the vehicle. He pulled in behind the vehicle and activated the blue lights on his marked patrol car. Officer Brandenburg approached the car and intended to

ask Jones why he was illegally present on school property after being banned. When he reached the driver's side, Officer Brandenburg saw Defendant was the driver and was alone in the car. Officer Brandenburg did not recognize Defendant. Defendant, who was twenty years old, told Officer Brandenburg that he did not possess a driver's license, but presented an identification card.

At trial, Jones testified he had allowed Defendant to borrow his car the night before so that Defendant could "go out." Jones had allowed Defendant to borrow his car on four or five prior occasions.

While speaking with Defendant, Officer Brandenburg noticed a strong odor of marijuana emanating from inside the vehicle. The odor of marijuana prompted Officer Brandenburg to detain Defendant and search both him and the car.

Officer Brandenburg recovered $1,504.00 in cash and a small "dime bag" of marijuana from inside Defendant's pockets. The officer explained a "dime bag" is normally a gram of marijuana. The "dime bag" of marijuana was packaged in a cut corner of a plastic bag, which, according to Officer Brandenburg, is how a "dime bag" is normally sold. A small amount of marijuana is placed into each corner of a "baggie," and the corners are tied off and cut.

Officer Brandenburg also found two larger bags of marijuana in the center console of the Impala. Subsequent analysis of the three bags of marijuana determined that the weight of the "dime bag" was 0.69 grams, and the weight of the two larger bags was 4.62 grams and 5.57 grams.

Officer Brandenburg recovered no empty baggies or scales from inside the car or from Defendant. Jones' driver's license was also found in the center console. Officer Brandenburg also recovered a loaded .40-caliber Glock handgun in the glove compartment, which was later determined to have been stolen. Jones testified at Defendant's trial and denied he owned the drugs or the stolen and loaded handgun found inside his car.

Defendant was indicted and tried upon charges of felonious possession with intent to sell or deliver marijuana and felonious possession of a weapon on educational property. Prior to trial, Defendant conceded he possessed the two bags of marijuana recovered from the center console of the vehicle. When questioned by the trial court during a *Harbison* hearing, Defendant stated he understood and agreed with defense counsel's decision to concede this fact before the jury. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed.

2d 672 (1986). In his initial brief before this Court, Defendant argued insufficient evidence was presented that he constructively possessed the marijuana recovered from the center console. Defendant subsequently filed a reply brief and expressly withdrew this argument due to the stipulation he had entered at the *Harbison* hearing.

The jury returned a verdict of not guilty on the charge of possession of a weapon on educational property, but found Defendant guilty of possession with intent to sell or deliver marijuana. The trial court sentenced Defendant to a suspended term of six to seventeen months' imprisonment and placed him on supervised probation for twenty-four months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Possession with Intent to Sell or Deliver Marijuana

Defendant argues the trial court erred by denying his motion to dismiss. Defendant asserts the State failed to present sufficient evidence of his intent to sell or deliver marijuana and the evidence shows the marijuana in Defendant's possession was for personal use. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, *in the light most favorable to the State*, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (emphasis supplied).

B. Evidence of Defendant's Intent to Sell or Deliver

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance

must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing N.C. Gen. Stat. § 90-95(a)(1)).

> While intent [to sell or deliver] may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. [T]he intent to sell or [deliver] may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia. Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.

State v. Wilkins, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809-10 (2010) (citations and internal quotation marks omitted).

On numerous occasions, this Court has applied these four and other related factors to determine whether the evidence was sufficient to permit the jury to infer the defendant possessed a controlled substance with the intent to sell or deliver and overcome the defendant's motion to dismiss.

1. Quantity of Illegal Drugs

[1] In some cases, the amount of the controlled substance recovered, standing alone, is sufficient to allow the jury to find the defendant possessed the requisite intent to sell or deliver. *See, e.g.*, *State v. Morgan*, 329 N.C. 654, 660, 406 S.E.2d 833, 836 (1991) (one ounce or 28.3 grams of cocaine "was sufficient evidence to support the inference that defendant intended to deliver or sell the cocaine"); *cf. State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268 (evidence insufficient to support an inference the defendant intended to sell or deliver where 215.5 grams of marijuana was seized without evidence of any packaging paraphernalia related to rolling or weighing), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

Here, a total of 10.88 grams of marijuana was recovered from Defendant's person and inside the vehicle's console. The two baggies inside the console contained a total of 10.19 grams, while the "dime bag" recovered from inside Defendant's pocket contained .69 grams of marijuana. The amount of marijuana found on Defendant's person and inside the vehicle's console might not be sufficient, standing alone, to support an inference that Defendant intended to sell or deliver marijuana. *See*

Wilkins, 208 N.C. App. at 731-32, 703 S.E.2d at 810 (Because the quantity of marijuana "alone is insufficient to prove that defendant had the intent to sell or deliver[,] . . . we must examine the other evidence presented in the light most favorable to the State."). Defendant's admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient to overcome Defendant's motion to dismiss and permit the jury to infer Defendant had the intent to sell or deliver marijuana.

2. Packaging of Illegal Drugs

[2] The 10.88 grams of marijuana was packaged in three plastic bags. The two bags recovered from the center console contained a similar amount of marijuana (4.62 and 5.57 grams), and were considerably larger than the "dime bag" found upon Defendant's person. Officer Brandenburg testified one gram of marijuana, or a "dime bag," has a street value of twenty to twenty-five dollars.

The dissenting opinion cites the testimony of Officer Brandenburg, and discusses the "quality" of marijuana contained in the two bags found in the center console. Officer Brandenburg testified:

> They were in larger bags, and if memory serves me right, they were more of what I would consider remnant marijuana, from where – if you were to bag up the dime bags, this would be the remnant stuff that didn't have as many buds and stuff in it as the regular marijuana, or the sellable marijuana.

Officer Brandenburg also testified the marijuana in the two larger bags "would typically need to be divided up into smaller bags to be sold."

The dissenting opinion concludes the clear implication of Officer Brandenburg's testimony was that the "remnant marijuana" he found in the console was "not of a quality typically offered for sale." The equal or stronger implication of Officer Brandenburg's testimony is that Defendant possessed marijuana for sale. Marijuana that is not "sellable" is unlikely to be "useable." It seems that an individual who purchases marijuana from a dealer solely for personal use would have no reason to possess the remnant or "unsellable" marijuana. The presence of two larger bags of marijuana containing "remnant" marijuana suggests the bags had been obtained in bulk and partially picked through for packaging "regular" or "sellable" marijuana. Defendant also possessed a dime bag of marijuana, which is how Officer Brandenburg testified that marijuana is packaged to sell. The packaging and possession of both the "sellable" and "unsellable" marijuana is evidence which raises an

inference and from which the jury could determine Defendant had the intent to sell marijuana.

3. Large Quantity of Unsourced Cash

[3] While the amount and packaging of the marijuana arguably might raise an issue whether Defendant possessed for personal use or the intent to sell or deliver, these factors are for the jury to decide and are not solely determinative of whether the charge was properly submitted to the jury. The uncontroverted evidence also shows Defendant, twenty years old, was carrying a large amount of cash ($1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. The cash found upon Defendant was also presented as evidence for the jury to view, and the prosecutor stated during his closing argument that the denominations of the cash consisted of ten, twenty, and one-hundred dollar bills.

The presence of cash is another factor that case precedents require us to consider to determine whether possession of illegal drugs with the intent to sell or deliver may be inferred. *Id.* at 731, 703 S.E.2d at 809-10; *see also State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988) (holding the large amount of cash on the defendant's person supported an inference that the defendant had the intent to sell or deliver the 4.27 grams of cocaine packaged in twenty separate envelopes).

4. Stolen and Loaded Handgun

[4] A stolen and loaded handgun was also recovered from inside the glove compartment of the vehicle. Jones denied any connection to the handgun. While the presence or possession of a firearm is not specifically listed as a *Wilkins* factor to determine intent to sell or deliver a controlled substance, *see Wilkin*s, 208 N.C. App. at 731, 703 S.E.2d at 809-10, this Court has specifically recognized: "As a practical matter, firearms are frequently involved for protection in the illegal drug trade." *State v. Smith*, 99 N.C. App. 67, 72, 392 S.E.2d 642, 645 (1990), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991).

The dissenting opinion does not recognize the presence of the stolen and loaded firearm in the glove compartment of the vehicle Defendant was driving as relevant to our consideration of whether Defendant's intent can be inferred, and views the packaging of the marijuana and cash recovered from Defendant as the only pertinent factors. Neither the Supreme Court of North Carolina nor this Court has ever recognized the factors set forth in *Wilkins* as exclusive.

This Court has specifically determined "the presence of a gun was relevant to the possession [of cocaine with intent to manufacture, sell, or deliver] and trafficking charges." *State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006); *see also State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (recognizing the "common-sense association of drugs and guns").

On numerous occasions our federal courts have also recognized the nexus between the presence or use of a firearm and the intent to sell or deliver controlled substances. *See*, *e.g.*, *United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) ("Because a gun is 'generally considered a tool of the trade for drug dealers, [it] is also evidence of intent to distribute.' " (quoting *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990))); *United States v. Rush*, 890 F.2d 45, 49-52 (7th Cir. 1989) (A loaded firearm found in a car defendant was approaching when arrested was relevant to show possession of heroin with intent to distribute, because the weapon was a "tool of the trade," and was an "essential part of the crime of possession with intent to distribute."); *United States v. Dunn*, 846 F.2d 761, 764 (D.C. Cir. 1988) (A loaded firearm found on the couch near the defendant was a "tool of the narcotic trade," and supported inference of intent to distribute where defendant constructively possessed drugs recovered from inside the house.).

The presence of a stolen and loaded handgun, a "tool of the trade for drug dealers," inside the vehicle and readily accessible to Defendant, is certainly relevant to and is another factor the court should consider in determining whether Defendant had the intent to sell or deliver an illegal substance. *White*, 969 F.2d at 684; *Boyd*, 177 N.C. App. at 171, 628 S.E.2d at 802. The registered owner of the vehicle testified neither the drugs nor the stolen and loaded firearm belonged to him.

Despite our precedents, the dissenting opinion does not consider the additional presence of the stolen and loaded firearm as an intent factor and cites this Court's decision in *Wilkins* to vote to reverse the jury's verdict. In *Wilkins*, the defendant possessed 1.89 grams of marijuana, contained within three separate "tied off" bags. *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. The defendant also carried $1,264.00 in cash. *Id.* The defendant testified that he had purchased the marijuana for personal use. *Id.* He further testified that approximately $1,000.00 of the cash recovered was money his mother had given him for a cash bond because he was "on the run," and the remaining $264.00 was from a check he had cashed. *Id.*

This Court considered the amount and packaging of the marijuana and the presence of explained cash on the defendant's person, and determined the evidence was insufficient to permit the jury to determine whether the defendant intended to sell or deliver the marijuana. *Id.* at 732-33, 703 S.E.2d at 810.

Wilkins is distinguishable from the facts and circumstances before us. In *Wilkins*, the defendant possessed only a small fraction of the amount of marijuana that Defendant possessed here, and the value of the marijuana was only thirty dollars. *Id.* at 732, 703 S.E.2d at 810. Here, no legitimate source is in the record for the $1,504.00 multi-denominations of cash recovered from Defendant's person and introduced before the jury.

The dissenting opinion also cites *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). In that case, officers found 1.2 grams of crack cocaine, consisting of four or five rocks, rolled in a napkin under the floor mat of a vehicle parked in the defendant's yard. *Id.* at 104, 612 S.E.2d at 175. The defendant was inside the house with $411.00 in cash on his person. *Id.* This Court determined the evidence was insufficient to show intent to sell or deliver the cocaine. *Id.* at 108, 612 S.E.2d at 177.

This Court explained that the defendant was not carrying a large amount of cash; the defendant stated the source of the cash was part of the money he had received from cashing his social security check; the officers could not state whether the money was in the defendant's pocket or wallet; and, the officers did not discover any other money on the premises. *Id.* at 107, 612 S.E.2d at 176-77. Here, Defendant was carrying a significantly larger amount of cash, consisting of ten, twenty, and hundred-dollar bills, with the marijuana and a stolen and loaded handgun.

The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*: (1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing "unsellable" remnant marijuana in two larger bags near a "dime bag" of "sellable" marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver's license; (5) illegally parking the vehicle in a fire lane near the school's entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

The presence of the stolen and loaded firearm in this case is relevant to ruling on Defendant's motion to dismiss, even though the jury returned a verdict of not guilty of possessing a weapon on educational

property. We review the totality of the evidence on Defendant's motion to dismiss in the light most favorable to the State to determine its sufficiency to submit the charge to the jury. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The jury's ultimate determination on the separate crime is not relevant to whether the trial court properly denied Defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana and submitted the charge to the jury.

"In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

This quantity of illegal drugs and its packaging, together with Defendant's access to Jones' vehicle since the previous evening; his illegal presence on high school grounds; the large amount of unsourced cash on Defendant's person; and the stolen and loaded handgun is sufficient to support a reasonable inference that Defendant intended to sell or deliver the marijuana he admittedly possessed, when reviewed in the light most favorable to the State. Jones, the owner of the vehicle, denied ownership of either the marijuana or the handgun. Defendant's argument is overruled. The trial court's ruling on Defendant's motion to dismiss is affirmed.

IV. Conclusion

The cumulative evidence, properly viewed in the light most favorable to the State, is sufficient for the trial court to submit and permit the jury to consider the intent element of possession with intent to sell or deliver marijuana. The trial court did not err and correctly denied Defendant's motion to dismiss.

We find no error in the denial of Defendant's motion to dismiss, the jury's conviction, or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge DILLON concurs.

Chief Judge McGEE dissents with separate opinion.

McGEE, Chief Judge, dissenting.

Because I believe "[t]he evidence in this case, viewed in the light most favorable to the State, indicates that [D]efendant was a drug user,

not a drug seller[,]" *State v. Wilkins*, 208 N.C. App. 729, 733, 703 S.E.2d 807, 811 (2010), I respectfully dissent.

I do not believe the evidence constituted substantial evidence of the intent to sell element of possession with intent to sell or deliver ("PWISD"). Specifically, (1) the amount of marijuana recovered was *de minimis*, and suggestive of possession for personal use rather than intent to sell; (2) the undisputed testimony was that the vast majority of the marijuana was not of typically "sellable" quality; (3) the packaging was likewise more consistent with personal use; (4) Defendant did not have scales, baggies, or other paraphernalia to prepare the marijuana for sale; (5) there was no testimony indicating that Defendant's actions were suggestive of an intent to sell marijuana; (6) the cash recovered, though some evidence of an intent to sell, was not of such quantity to overcome the lack of additional supporting evidence, and there was no testimony explaining the relevance of the cash to any intent to sell; (7) the gun recovered from the glove compartment was introduced as evidence in support of the possession of a firearm on educational property charge, not in support of PWISD, and there was no testimony linking the gun to any intent to sell; (8) even considering the gun, the totality of the evidence is more suggestive of possession for personal use than for sale; and (9) the additional factors relied upon by the majority opinion have minimal to no relevance to the contested issue.

I. *Facts*

In addition to the facts included in the majority opinion, I also note the following. Officer Brandenburg testified that he saw Jones' Impala "pull[] into the main entrance, what we call the car loop, the car pool loop, of the school, which goes right to the front entrance of the school." The Impala parked in the "fire lane" of the car pool loop, which Officer Brandenburg testified was "very common." Officer Brandenburg determined that Defendant, and not car owner Jones, was the sole occupant. Officer Brandenburg did not know Defendant prior to this interaction and he testified Defendant said he was there to pick up a friend, a student at Enloe. Officer Brandenburg knew the student, and saw him looking out of the school at Defendant while Defendant was detained.

Though Defendant did indicate during the *Harbison* hearing that he was going to admit to possession of all the marijuana, Defendant did *not* admit at trial or in closing that he was guilty of possessing the 10.19 grams recovered from the center console of Jones' vehicle. Defendant's attorney, apparently having changed his trial strategy, argued in his opening statement that Defendant was "guilty of one thing and that's for having

a dime bag of marijuana in his pocket." In closing, Defendant's attorney argued that "[Defendant] just has his own one bag for personal use. And that's what is called possession of marijuana. So we would ask you to find him guilty of possession of marijuana." Defendant moved to dismiss the charges against him at the close of the State's evidence and all the evidence, specifically focusing on the absence of sales-related paraphernalia, such as "baggies" and "scales." For the purposes of Defendant's motion to dismiss, I assume Defendant possessed the entire 10.88 grams of marijuana recovered from both his person and the Impala. The trial court denied Defendant's motions.

II. *Analysis*

We must determine whether there was substantial evidence that Defendant had the intent to sell marijuana. As noted by the majority opinion, intent to sell can be inferred from " '(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.' " *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 809–10 (citation omitted). These factors ("*Wilkins* factors") seem to have first appeared in their current form in *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005), an opinion that examined earlier case law. In prior opinions, the presence of firearms was not considered in the intent to sell analyses, even when firearms were recovered. *See State v. Smith*, 99 N.C. App. 67, 73–74, 392 S.E.2d 642, 646 (1990); *State v. King*, 42 N.C. App. 210, 212–13, 256 S.E.2d 247, 248–49 (1979).

Traditionally, the three *Wilkins* factors that appear to have been most influential have been the amount of the substance, its packaging, and the presence of paraphernalia used in portioning and packaging the substance for sale. *See King*, 42 N.C. App. at 212–13, 256 S.E.2d at 248–49; *State v. Sanders*, 171 N.C. App. 46, 48, 50 and 56-57, 613 S.E.2d 708, 710, 711 and 715, *aff'd per curiam*, 360 N.C. 170, 622 S.E.2d 492 (2005) (suspiciously packaged diazepam, marijuana residue in multiple locations, "plastic baggies with corners ripped off," scales, evidence defendant was not personally using diazepam, and other evidence recovered not sufficient to prove intent when there was no officer testimony stating certain evidence was "indicative of an intent to sell rather than personal use"); *State v. Roseboro*, 55 N.C. App. 205, 210, 284 S.E.2d 725, 728 (1981) ("while the quantity of cocaine was small, there was evidence of the presence of drug paraphernalia (two sets of scales, one beside a pouch of cocaine, and an abundance of Ziploc bags) sufficient for the charge of possession with intent to sell to go to the jury").

The evidence in a number of these cases was stronger than in the present case, and I note that in *Sanders*, our Supreme Court affirmed the majority opinion's analysis *per curiam*, including the importance of testimony demonstrating evidence presented at trial is more suggestive of an intent to sell than personal use. In the present case, there was no such testimony, and the State and the majority opinion primarily rely on factors not contained in *Wilkins* or other binding precedent. I do not contend the *Wilkins* factors are exclusive, but I do believe they have been established as more relevant to our analysis than other potential evidence.

A. Quantity

In order for the amount of a controlled substance to be considered a relevant factor in determining an intent to sell, "it must be a substantial amount." *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted). The closer the amount of a controlled substance approaches the amount required for a trafficking conviction, the more relevant is the amount in suggesting an intent to sell. *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 836 (1991) (citations omitted).[1] N.C. Gen. Stat. § 90-95(h)(1) sets out the smallest quantity of marijuana required for a charge of "trafficking in marijuana[,]" which amount is in excess of ten pounds. Defendant in this case was found to have been in possession of 10.88 grams of marijuana — approximately 0.38 ounces or 0.024 pounds. Ten pounds equals approximately 4,536 grams, or about *417 times* the 10.88 grams recovered from Defendant's person and Jones' Impala. Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. This Court has deemed an amount of cocaine that was relatively much *greater* than the amount of marijuana recovered in the present case as a "*de minimis*" amount:

> defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for trafficking. Therefore, under our Supreme Court's holding in *Morgan*, it cannot be inferred that defendant had an intent to sell or distribute from such a de minimis amount

1. The majority opinion cites *Morgan* for the statement that "one ounce or 28.3 grams of cocaine 'was sufficient to support the inference that defendant intended to deliver or sell the cocaine[.]'" I note that according to *Morgan*: "The General Assembly has determined that twenty-eight grams of cocaine evinces an intent to distribute that drug on a large scale. N.C.G.S. § 90–95(h)(3) (1990). As in *Williams*, we are satisfied that the full ounce defendant had conspired with Mr. Queen to possess 'was a substantial amount and was more than an individual would possess for his personal consumption.'" *Morgan*, 329 N.C. at 660, 406 S.E.2d at 836 (citations omitted). For trafficking purposes, one ounce of cocaine is equivalent to ten pounds of marijuana. *See* N.C. Gen. Stat. § 90-95(h)(1) (2015).

> alone. The State was required to present either direct or circumstantial evidence of an intent to sell.

Nettles, 170 N.C. App. at 106, 612 S.E.2d at 176 (citation omitted). In the present case, Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. For purposes of the trafficking statutes, as compared to the amount of cocaine recovered in *Nettles*, the amount of marijuana recovered in the present case is over sixteen times less than the amount of cocaine recovered in *Nettles* – 10.88 grams of marijuana must be considered *de minimis*. *Id.*; *see also State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977) (citations omitted) (215.5 grams of marijuana, "without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution"). 10.88 grams of marijuana was clearly insufficient "to raise an inference that the marijuana was for the purpose of distribution." *Id.*

The majority opinion attempts to compare the amount of marijuana recovered in the present case to that recovered in certain other cases, such as *Wilkins*. The relevant issue is not whether the amount of marijuana recovered *in the present case* was more or less than the amount of marijuana recovered in some other case wherein insufficient evidence of intent to sell was found; the issue is whether the amount recovered in the present case was substantial enough to provide some evidence of intent to sell. Since the amounts found in *Wilkins*, *Nettles*, and the present case are all *de minimis*, the amounts recovered do not support a finding of an intent to sell. I find no relevant difference between the 1.89 grams of marijuana involved in *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809, and the 10.88 grams recovered in the present case, as both are *de minimis*, and substantially less than has been determined by this court to be consistent with personal use. *See Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268.

In its attempt to distinguish this case from *Wilkins*, the majority opinion notes that the value of the marijuana in *Wilkins* was approximately $30.00.[2] However, the value of the marijuana is directly tied to the amount of the marijuana. The evidence in this case shows only that Defendant possessed a small amount of marijuana, consistent with personal use. *See Nettles*, 170 N.C. App. at 107–08, 612 S.E.2d at 177; *State v. Turner*, 168 N.C. App. 152, 158-59, 607 S.E.2d 19, 24 (officer testified ten rocks of crack cocaine, weighing 4.8 grams, with value of $150.00 to

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2 The true value of all the marijuana recovered in the present case was not established at trial.

$200.00, was more than personal consumption amount; this Court held that testimony was insufficient to support intent to sell).

B. Packaging

The majority opinion focuses almost exclusively on this dissent's discussion of the "quality" of the marijuana as testified to by Officer Brandenburg in its "packaging" analysis. However, this dissenting analysis is primarily focused elsewhere, and I would reach the same conclusion even assuming *arguendo* that all the marijuana was of "sellable" quality. This Court has analyzed the packaging prong of PWISD as follows:

> "The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute." *State v. Williams*, 71 N.C. App. 136, 139, 321 S.E.2d 561, 564 (1984) (holding that the trial court did not err in denying defendant's motion to dismiss where "[t]he evidence at trial showed that the [27.6 grams of] marijuana . . . was *packaged in seventeen separate, small brown envelopes known in street terminology as 'nickel or dime bags*' "); *see also In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007) ("*Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately.*"); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding an intent to sell or deliver where defendant possessed 5.5 grams of cocaine separated into *22 individually wrapped pieces*); *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005). The State has not pointed to a case, nor have we found one, where the division of such a small amount of a controlled substance constituted sufficient evidence to survive a motion to dismiss. Moreover, the [small amount of marijuana] *was divided into only three separate bags*. While small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer. Consequently, we hold that the separation of [the small amount] of marijuana into three small packages, worth a total of approximately $30.00, does not raise an inference that defendant intended to sell or deliver the marijuana.

Wilkins, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted) (emphasis added); *see also Morgan*, 329 N.C. at 659, 406 S.E.2d at 835.

The cases cited in *Wilkins* involved defendants found in possession of large numbers of pre-packaged smaller units of contraband ready for individual sale. In order for the number of pre-packaged units to support an inference of an intent to sell, it must be a number large enough to suggest the units were not purchased for personal use. For example, in an unpublished opinion, this Court held that 10.98 grams of marijuana, packaged in *thirteen* individual bags, was insufficient to prove intent to sell. *In re N.J.*, 230 N.C. App. 140, 752 S.E.2d 255 (2013) (unpublished) (there was insufficient evidence to determine if marijuana was possessed for personal use, or sale, where juvenile admitted that he possessed *thirteen individually wrapped bags of marijuana*, weighing a total of 10.98 grams).

In the present case, as in *Wilkins*, the marijuana was only divided into three bags, but one was a single "dime bag" found in Defendant's pocket, while the other two were "relatively small" plastic bags found in the center console of the car. There were no additional empty bags or containers into which this marijuana could have been divided for sale, nor any scale with which to measure the marijuana for sale. Officer Brandenburg testified that he had arrested people pursuant to his duties as a school resource officer, and that typically it was the small "dime-sized" bags that were brought on school grounds for sale, and that "[n]ormally [the] dime-sized bag[s] [are found] inside of another bag or a capsule. Recently . . . medical capsules has been the new way to do it. But they'll be the little dime bag inside bigger packages." Officer Brandenburg also responded: "Yes, ma'am" when he was asked: "[W]hen you talk about the dime bags and how they – when they're sold they will be inside some larger container, there would often be multiple packages of dime bags in that larger container[.]" The following colloquy occurred between Defendant's attorney and Officer Brandenburg:

> Q. Because a drug seller will take – will have larger bags of marijuana, put them in a smaller bag, reweigh them – weigh them on a scale to determine the correct amount of marijuana is being sold and then sell it to someone, correct?
>
> A. That's what I've heard, yes, ma'am.
>
> Q. Okay. So in that sense, if you see plastic – a box of plastic baggies in the car and you see scales in the car, you assume it's indicative of drug selling, correct?
>
> A. Yes, ma'am.
>
> Q. And you did not see a scale or a plastic – a box full of plastic baggies in this car, correct?

A. I do not remember seeing that, no, ma'am.

. . . .

Q. [T]hose two big bags would typically need to be divided up into smaller bags to be sold, correct?

A. Yes, ma'am.

Q. And to do that you would need multiple plastic baggies and scales, correct?

A. That would be correct.

In Officer Brandenburg's opinion, the marijuana recovered from the console was not "regular" or "sellable marijuana" and, even had it been "sellable," no scales were found in the car with which to divide the marijuana, nor was any separate packaging found in the car with which to re-package the marijuana for sale. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 177 (evidence not substantial in part because there was no "drug paraphernalia typically used in the sale of drugs found on the premises"). In short, "[t]here was *no testimony* that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs." *Id.* at 107, 612 S.E.2d at 176 (emphasis added).

Assuming, *arguendo*, that the quality of the marijuana is an appropriate factor to consider in the packaging analysis, the majority opinion, adopting the State's argument on appeal, states: "The packaging and possession of both the 'sellable' and 'unsellable' marijuana is evidence which raises an inference and from which the jury could determine Defendant had the intent to sell marijuana." The majority opinion reaches this conclusion based upon its contentions that: "Marijuana that is not 'sellable' is unlikely to be 'useable[;]' " a person "would have no reason to possess the remnant or 'unsellable' marijuana[;]" and that the presence of the "larger bags of marijuana containing 'remnant' marijuana suggests the bags had been obtained in bulk and partially picked through for packaging 'regular' or 'sellable' marijuana." There was no testimony supporting this reasoning, and no such argument was made to the trial court or the jury. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, two bags of marijuana containing 4.62 and 5.57 grams of marijuana constitute a *de minimis* amount wholly consistent with personal use, not "bulk" purchases. Marijuana of all qualities can be used, and would be unlikely to be thrown out; however "remnants" would be difficult to sell. The absence of scales and additional baggies suggests that to the extent the larger bags had been

"partially picked through," it was to obtain the higher quality marijuana for personal use, and not for the purpose of repackaging and sale.

Even assuming, *arguendo*, the larger bags had been picked through at some earlier time to obtain the quality marijuana for sale, if the remaining marijuana in the larger bags was not "sellable" at the time Defendant was arrested, that would only constitute evidence that Defendant – or someone – had possessed that marijuana in the *past* with the intent to sell it, and did sell it. However, "unsellable" marijuana is, by definition, not indicative of a *present* intent to sell that particular *unsellable* marijuana. Though the State could have attempted to do so, Defendant was not indicted for having already sold the marijuana.

C. Cash

This Court had stated that "unexplained cash is only one factor that can help support the intent element." *Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted). In both *Wilkins* and the present case, reasonably large amounts of cash were recovered – $1,264.00 and $1,504.00, respectively. "As with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute." *I.R.T.*, 184 N.C. App. at 589, 647 S.E.2d at 137. In a case cited by the majority opinion "[t]he police . . . searched defendant's person, and seized large rolls of currency totaling $10,638.00" along with cocaine. *State v. Alston*, 91 N.C. App. 707, 708, 373 S.E.2d 306, 308 (1988). This Court justified holding that the evidence in *Alston* was sufficient to support a conclusion that the defendant had the intent to sell cocaine as follows:

> State's evidence showed that there was, at the most, 4.27 grams of cocaine[3] contained in the envelopes found in the building. The cocaine was packaged, however, in twenty separate envelopes. Even where the amount of a controlled substance is small, the method of packaging is evidence from which the jury may infer an intent to sell. The cash [$10,638.00] found on defendant's person also supports such an inference.

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3 Although this Court treated the amount of cocaine in *Alston* as "small," 4.27 grams constituted approximately 15.00% of the amount required for the lowest grade of "trafficking" cocaine, as opposed to the amount of marijuana found in the present case, which was 0.0024% of the amount required for a trafficking charge. N.C.G.S. § 90-95(h)(3)(a.). For trafficking purposes, the amount of cocaine involved in *Alston* was 6,250 times greater than the amount of marijuana involved in this case.

Alston, 91 N.C. App. at 711, 373 S.E.2d at 310 (citation omitted). Neither the amount of the drugs, the packaging, nor the cash recovered in the present case are similar to those factors in *Alston*. The majority opinion argues that because the amount of cash recovered in *Nettles* was less than that recovered in the present case, *Nettles* is distinguishable. However, this Court in *Wilkins* analogized the facts before it with those in *Nettles* as follows:

> The present case is *similar to Nettles* where this Court held that possession of a small amount of crack cocaine along with $411.00 and a safety pin, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. This Court held that "[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." We believe the totality of the circumstances in this case compels the same conclusion. Defendant possessed a *very small amount of marijuana* that was *packaged in three small bags* and he had *$1,264.00 in cash* on his person. The evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller.

Wilkins, 208 N.C. App. at 733, 703 S.E.2d at 810–11 (citations omitted) (emphasis added). The implication in *Wilkins* is that if $411.00 was not "a large amount of cash" for the purposes of determining an intent to sell, then neither was $1,264.00. In line with *Wilkins*, I do not believe that the difference in the amounts of cash recovered in *Nettles* and the present case constitutes a strong distinguishing factor between the two cases.

The majority opinion further attempts to distinguish *Nettles* on the bases that in that case "the officers could not state whether the money was in the defendant's pocket or wallet," and no other money was discovered on the premises. I see no relevance attached to whether the cash in *Nettles* was recovered from the defendant's wallet or pocket, and there is *no difference* concerning whether cash was recovered from any additional locations, since in neither *Nettles* nor the present case was any additional cash recovered. *See State v. Barnhart*, 220 N.C. App. 125, 127–28, 724 S.E.2d 177, 179 (2012) (citations omitted) (emphasis added) ("When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines 'whether the State presented substantial evidence in support of each element of the charged offense.' 'Substantial evidence is

relevant evidence that a reasonable person might accept as adequate, or would consider *necessary to support a particular conclusion*.' ").

Further, the majority opinion attempts to distinguish *Wilkins* and *Nettles* from the present case by drawing a distinction between "explained" cash and "unexplained" cash. The majority opinion states that "no legitimate source is in the record for the $1,504.00 multi-denominations of cash recovered from Defendant's person and introduced before the jury[,]" whereas in *Wilkins* and *Nettles* the defendants gave innocent explanations for possessing relatively large amounts of cash. No such distinction between explained and unexplained cash is made in these opinions, and any such distinction is irrelevant when reviewing the trial court's denial of a motion to dismiss based upon insufficient evidence. The majority opinion relies on language in the fact section of *Wilkins* to support its assertion that this Court factored "the presence of *explained* ['legitimate source'] cash on the defendant's person" in reaching its conclusion that the defendant's motion to dismiss should have been granted. (Emphasis added). However, in the analysis portion of the opinion, this Court *did not address the defendant's testimony concerning the provenance of the cash*, instead reasoning:

> In addition to the packaging, we must also consider the fact that defendant was carrying $1,264.00 in cash. "However, *unexplained cash* is only one factor that can help support the intent element." Upon viewing the evidence of the packaging and the cash "cumulatively," we hold that the evidence is insufficient to support the felony charge.

Id. at 732–33, 703 S.E.2d at 810 (citations omitted) (emphasis added).

Initially, contrary to the majority opinion's characterization of the cash in *Wilkins* as "explained cash," this Court in *Wilkins* clearly characterized the $1,264.00 as "unexplained cash" in its PWISD analysis. *Id.* For the purposes of a motion to dismiss, any large amount of cash found on a defendant is unexplained, regardless of what the defendant says, unless there is uncontroverted evidence establishing the provenance of the cash. Appropriately, this Court in *Wilkins* did *not* consider the defendant's explanation of how he had come by the $1,264.00, and it treated this cash as "unexplained" because this Court was *required* to treat the $1,264.00 as "unexplained cash." Factoring the defendant's self-serving testimony explaining why he was carrying a large amount of cash would be violative of our standard of review on a motion to dismiss, as *Wilkins* recognized. *Id.* at 732, 703 S.E.2d at 810 ("we must examine the other evidence presented in the light most favorable to the

State"). The same standard of review applies to the fact, noted in the majority opinion, that the defendant in *Wilkins* "testified that he had purchased the marijuana for personal use." The defendant's testimony in this regard was irrelevant in *Wilkins*, and has no relevance in attempting to distinguish the facts of *Wilkins* from the facts of the present case.

Further, in *Wilkins* the $1,264.00 was recovered in denominations of "60 $20.00 bills, one $10.00 bill, nine $5.00 bills, and nine $1.00 bills." *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. These are smaller denominations consistent with what a drug dealer might accumulate when selling packages of marijuana. In the present case, the majority opinion contends that the cash recovered from Defendant "consist[ed] of ten, twenty, and hundred-dollar bills[.]" However, contrary to the assertions of the State and the majority opinion, there is *no record evidence* of the denominations comprising the $1,504.00 recovered from Defendant. There was no testimony about the denominations of the bills, nor what denominations commonly indicate drug sales. In its closing argument, the State contended the "$1500 [was comprised of] twenties, hundreds, tens, small denominations, big denominations[.]" However, the State's closing argument is not record evidence. *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (citation omitted) (" 'it is axiomatic that the arguments of counsel are not evidence' ").

The majority opinion's attempt to distinguish *Nettles* fails for the same reasons discussed above. I do not believe this Court considered the defendant's explanation of where the cash came from in its analysis and, as stated above, it would have been inappropriate for it to have done so. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). I also note that Officer Brandenburg testified that he *never asked* Defendant where the $1,504.00 came from. "[G]iven the fact that neither the amount of marijuana nor the packaging raises an inference that [D]efendant intended to sell the drugs, the presence of [$1,504.00] as the only additional factor is insufficient to raise the inference." *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 810.

D. Non-*Wilkins* factors

The majority opinion relies heavily on evidence not related to the factors set forth in *Wilkins* and, while I do not dispute that non-*Wilkins* factors may be relevant to an intent to sell analysis, I do not believe they generally carry the same weight. The majority opinion states:

> The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*:

> (1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing "unsellable" remnant marijuana in two larger bags near a "dime bag" of "sellable" marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver's license; (5) illegally parking the vehicle in a fire lane near the school's entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

I believe the factors in *Wilkins* have been primarily relied upon in intent to sell cases because they either relate directly to the controlled substance itself – packaging, labeling, storage, quantity; or constitute evidence that is inextricably associated with sale or delivery of the controlled substance – the actions of the defendant (such as suspicious hand-to-hand transactions), *see, e.g.*, *State v. Stokley*, 184 N.C. App. 336, 337, 646 S.E.2d 640, 642 (2007); suspiciously large amounts of cash (which is often found on people who have been selling significant amounts of illegal drugs), *see, e.g.*, *Alston*, 91 N.C. App. at 708, 711, 373 S.E.2d at 308, 310; and, most importantly, drug paraphernalia used for preparing the drugs for sale (such as scales for weighing and multiple bags or other containers for individual packaging), *see, e.g.*, *State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 889 (2015).

I presume the majority opinion's additional factors are not included among the *Wilkins* factors because this Court has determined that, generally, the probative value of non-*Wilkins* factors in determining intent to sell or deliver is less than that of the chosen factors. Concerning the additional "factor" relied upon by the majority opinion that *Jones* had been banned from Enloe for drug possession, as supporting evidence of *Defendant's* criminal intent, is improper. Endorsing this approach would essentially allow the State to present prior bad act evidence *of a third party* as proof that *the defendant acted in conformity with the third party's prior bad act*. See N.C. Gen. Stat. § 1A-1, Rule 402(b) (2015). The fact that a defendant is not in possession of a valid driver's license is not relevant in determining the defendant's intent to sell marijuana. Concerning the fact that Defendant had stopped the car in a fire lane, absent evidence that this behavior had been observed in relationship to prior drug transactions at Enloe, or similar evidence, it is also irrelevant. The fire lane was directly in front of the school, and part of the "car pool lane" where students were regularly picked up. Officer Brandenburg testified that people regularly parked in that fire lane and, when they did so, he would ask them to move if they were still in their vehicles, as

Defendant was. The State did not rely on any of these alleged "factors" in its prosecution of Defendant for PWISD. There was no testimony that any of this evidence was indicative of, or related to, any intent to sell, nor were any of these "factors" argued to the jury as such. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176.

Concerning Defendant's presence on school property, the testimony of both Officer Brandenburg and Jones supports Defendant's statement to Officer Brandenburg that he was in the car pool lane because he was going to pick up his friend Wilson, a student at Enloe. Officer Brandenburg, who personally knew Wilson, testified that when he was outside with Defendant: "I could see [Wilson] through the main door windows of the school looking out at us." Jones testified that after Defendant was arrested, Defendant told him he went to Enloe to pick up Wilson. There was no evidence that Defendant's behavior was inconsistent with that of other visitors to the school, and Officer Brandenburg testified to no suspicious activity on the part of Defendant from which he could infer an intent to sell marijuana. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176 ("Defendant's actions were not similar to the actions of a drug dealer."). Defendant did not interact with *anyone* before he was approached by Officer Brandenburg, and the fact that Defendant was not a student at Enloe does not show an intent to sell.

Again, the State neither solicited evidence, nor argued to the jury, that *any* of the above non-*Wilkins* factors supported an inference that Defendant had the intent to sell. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, the State did not attach any significance to the above evidence in its argument on appeal concerning intent to sell.

Concerning the handgun recovered from the glove compartment of Jones' car, I do not contend that recovery of a weapon can never be relevant to PWISD, I simply do not believe its relevance in the present case, combined with the other relevant evidence, was sufficient to survive Defendant's motion to dismiss. The State neither presented testimony suggesting that the presence of the gun in the glove compartment of Jones' Impala was indicative of an intent to sell on Defendant's part, nor made any such argument to the jury. If the jury considered the gun in its intent to sell deliberation, it would have had to have done so on its own initiative, which could have been improper. *See State v. Mitchell*, 336 N.C. 22, 29-30, 442 S.E.2d 24, 28 (1994); *Smith*, 99 N.C. App. at 71–72, 392 S.E.2d at 645. Because the State did not present testimony in support of

this argument, nor make this argument to the jury, I presume the jury acted appropriately.[4]

The majority opinion, in arguing for greater relevance of the handgun in our analysis, relies in part on a statement in *Smith*: "As a practical matter, firearms are frequently involved for protection in the illegal drug trade." *Smith*, 99 N.C. App. at 72, 392 S.E.2d at 645. It is important to place this quote in context. In *Smith*, upon searching the two defendants' residence, officers found, *inter alia*, four "nickel" bags of marijuana; rolling papers; "a bag of marijuana in a photograph holder;" $355.00; 0.22 grams of cocaine in a "bottle labeled 'manitol[;]' " a box of plastic baggies; "seventeen individual baggies" with 2.1 grams of cocaine divided between them, all located in a larger bag; three pistols; and "some scales." *Smith*, 99 N.C. App. at 70, 392 S.E.2d at 644.

One of the defendants in *Smith* was "charged with felonious possession of a firearm by a convicted felon." *Id.* at 69, 392 S.E.2d at 643. Both the defendants were charged with PWISD. *Id.* "The trial court granted defendant Smith's motion to sever the firearm possession charge" from the PWISD charges. *Id.* Therefore, the three pistols recovered from the residence *were not introduced as evidence of intent to sell* in the PWISD portion of the trial. However, at the PWISD portion of the trial an officer testified that three guns were found in the residence. The defendants in *Smith* first argued that admission of this testimony "was irrelevant and unduly prejudicial" during the PWISD portion of the trial. *Id.* at 71, 392 S.E.2d at 644. In deciding the defendants' first argument, this Court first held the defendants' argument was not properly preserved, then further reasoned:

> We think that the testimony concerning the guns was relevant to "illustrate the circumstances surrounding [defendant Crawford's] arrest." *We also cannot say that it is totally irrelevant to* . . . the charges of possession with intent to sell or deliver cocaine or marijuana. *As a practical matter, firearms are frequently involved for protection in the illegal drug trade.*

4. In light of Defendant's acquittal for possessing a firearm on educational property, we now know that the jury did not improperly consider the gun in its intent to sell analysis. I do not contend that the not guilty verdict on the charge of possession of a firearm was relevant to Defendant's motion to dismiss the PWISD charge. The jury's ultimate determination that the State had not proved Defendant possessed the gun in the glove compartment cannot serve to retroactively support Defendant's motion to dismiss.

> *We recognize the highly inflammatory nature of raising the issue of firearms before the jury, and that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice.* In this case, however, if there was error in admitting the testimony, it was harmless to the defendants since the evidence against them was ample.

Smith, 99 N.C. App. at 71–72, 392 S.E.2d at 645 (citations omitted) (emphasis added).

This analysis was *solely* limited to whether the defendants were *prejudiced* by the admission of the gun evidence during the PWISD portion of the trial, and had *no connection* to the defendants' second argument, which concerned *the sufficiency of the evidence* to support PWISD. Further, this Court in *Smith* recognized that evidence of the presence of firearms in a trial for PWISD could be "highly inflammatory" and "that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice." *Id.* at 72, 392 S.E.2d at 645. The portion of the analysis cited by the majority opinion is also *dicta*. In the part of its opinion where this Court addressed the defendants' argument that the State has failed to present sufficient evidence of intent to sell, the recovery of the firearms was *not* considered, *nor even mentioned*. *Id.* at 73, 392 S.E.2d at 646.[5]

In the present case, Defendant's charge of possession of a firearm on educational property was not severed from his charge of PWISD, so the jury was not prevented from hearing evidence of the gun recovered from the glove compartment of Jones' Impala prior to deliberating the PWISD charge. However, the questions, testimony, and arguments made at trial indicate the evidence of the firearm was presented solely in support of the charge of possession of a firearm on educational property, and not in support of PWISD. *See Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711 (emphasis added) ("In particular, the dissent points out that the thirty diazepam pills were found inside a cellophane cigarette package inside a plastic bag. However, *no officer testified that the packaging of the*

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5. I note that this Court has, in the past, improperly stated that *Smith* includes a firearm related holding relevant to PWISD. *See State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006) ("*See State v. Smith*, . . . (holding that trial court could properly determine that evidence of a gun was relevant to the charge of possession with intent to sell or deliver cocaine because '[a]s a practical matter, firearms are frequently involved for protection in the illegal drug trade'")). There is no such holding in *Smith*, however the majority opinion relies on this language from *Boyd* in support of its argument.

pills was indicative of an intent to sell rather than personal use."). There is no evidence that the trial court considered the gun at all when it denied Defendant's motion to dismiss the PWISD charge. It appears, as in *Smith*, that the State presented the gun evidence solely in support of the possession of a firearm charge. Because this argument *was not made at trial*, Defendant had no opportunity to object to it and argue that the jury should be prohibited from considering the evidence of the gun in its intent to sell deliberations, pursuant to N.C. Gen. Stat. § 1A-1, Rule 403, or for any other reason.

The State's arguments in closing made in support of the intent prong of PWISD indicate that the gun had *not* been introduced as evidence of Defendant's intent to sell:

> In this case you can look at the denominations of currency in [D]efendant's pocket,[6] the evidence that you've heard testimony of with relation to the street value of these drugs . . . . Those are things that you can all – you can add together and say that those are circumstantial pieces of evidence that showed his intent to sell and deliver the marijuana.
>
> The fact that he is out of school, the fact that he is out of school at 10:00 in the morning on a Friday as a 20-year-old man who is not enrolled there, not a student there and says he's there to pick up someone else who they tried to locate and can't.[7] What can you infer from that? Was he really there to pick somebody up, or was he there to do something else?
>
> . . . .
>
> In this case you're looking at the circumstances under which this evidence was recovered to determine what you think [Defendant]'s intent was, if he, in fact, possessed it.
>
> . . . .

6. Again, because there is no record evidence of the denominations, we cannot consider the State's characterization of the cash recovered on appeal.

7. Officer Brandenburg's testimony was that while he was detaining Defendant at the school, he saw Wilson, the friend Defendant claimed he was picking up, and that they seemed to communicate in some manner at a distance, but that when Officer Brandenburg later tried to locate the friend at the school, he could not.

> But [the marijuana was] packaged individually. If you're using for yourself, why have them in separate bags, *the separate packaging*, *the cash*, the location of the items. Those are things that you can look at and draw inferences from to conclude [D]efendant's intent, that his intent was to distribute marijuana. It could very well be that his intent was to distribute marijuana that day at the school. He said he was there to pick somebody up.

The State, in closing, did not argue any relevance related to the amount of marijuana recovered, the gun, or that the cash was "unexplained."

The majority opinion also cites *Boyd* and *State v. Willis*, 125 N.C. App. 537, 481 S.E.2d 411 (1997) in support of its argument for the relevance of the gun recovered from Jones' Impala. As noted above, the "holding" in *Smith* upon which the *Boyd* Court relied does not exist. Further, *Boyd* stands for the proposition that *on the facts of that case*, the gun was relevant to PWISD, and that the trial court did not *abuse its discretion* in ruling that the probative value of the gun was not outweighed by its prejudicial effect. *Boyd*, 177 N.C. App. at 171-72, 628 S.E.2d at 802-03. The trial court in the present case was never asked to make any rulings pursuant to Rules 401 or 403, presumably because the gun *was never presented as evidence in support of PWISD*, the trial was not bifurcated, and the gun was clearly relevant and probative with respect to Defendant's possession of a firearm charge.

Willis did not involve any issue of intent to sell. This Court mentioned the "common-sense association of drugs and guns" in its analysis concerning whether the officers in that case were justified in conducting a more thorough search of the defendant, because the defendant had just left a known drug house, was acting nervously, and the "sudden lunge of [the defendant's] hand into the interior of his jacket during the [initial] pat-down" put the officers in reasonable concern for their safety. *Willis*, 125 N.C. App. at 543, 481 S.E.2d at 411. Based upon this reasoning, this Court held: "At that point, the situation became fluid and volatile, and Detective Sholar reacted reasonably and proportionately in searching and emptying the jacket pocket." *Id.* at 543-44, 481 S.E.2d at 412. That drug dealers are known to sometimes carry weapons is not in dispute. This fact does not make every firearm found in proximity to a defendant automatically relevant or admissible in a PWISD trial.

The majority opinion cites federal cases in support of its argument that "[d]espite our precedents, the dissenting opinion does not consider the additional presence of the stolen and locked firearm as an intent

factor." Initially, the majority opinion has cited only one North Carolina precedent, *Boyd*, that considered the presence of a gun as an intent factor. The federal cases are not binding precedent in the matter before us. Further, I reiterate that I do consider firearms as *potential* "intent factors," but based upon North Carolina precedent, I do not believe it is *per se* proper to consider possession of a firearm in every PWISD case, nor do I believe possession of a firearm should generally be given the same weight as the established *Wilkins* factors. Finally, because the State did not introduce the gun recovered from Jones' Impala as evidence of Defendant's intent to sell, Defendant had no opportunity to make a Rule 403 objection.

"Quality" is not a *Wilkins* factor, but in the proper case I believe it can be considered in an intent to sell analysis. Concerning the quality of the marijuana in the present case, I rely on the uncontroverted testimony of Officer Brandenburg. As the majority opinion acknowledges concerning the two bags of marijuana found in the console, Officer Brandenburg testified:

> They were in larger bags, and if memory serves me right, *they were more of what I would consider remnant marijuana*, from where – if you were to bag up the dime bags, *this would be the remnant stuff that didn't have as many buds and stuff in it as the regular marijuana*, or *the sellable marijuan*a.

Officer Brandenburg's testimony implies that the "remnant marijuana" he found in the console was not "regular" or "sellable marijuana." At a minimum, his testimony strongly implies that the "remnant marijuana" recovered from the console was not of a quality typically offered for sale. However, I would still vacate Defendant's conviction if the *de minimis* 10.19 grams of marijuana was in fact quality "sellable marijuana" and not low-quality "remnant stuff."

E. *Totality of the Evidence*

The majority opinion devotes a significant portion of its analysis attempting to distinguish the facts in the present case from those in *Wilkins* and *Nettles* by focusing on individual differences between specific factors, and I have already addressed a number of those arguments. However, it is the totality of the evidence in each case that must be considered, and I do not rely solely on *Wilkins* in support of my "vote to reverse the jury's verdict." This Court considered *Wilkins* and *Nettles* in a very recent unpublished opinion, *State v. Carter*, __ N.C. App. __, __ S.E.2d __, 2017 WL 3027550 (2017) (unpublished), and then vacated

the defendant's conviction for PWISD. I find the facts and reasoning in *Carter* relevant to our analysis. In *Carter*, police recovered from the defendant 0.63 grams of methamphetamine in five separate baggies "or .0225% of the minimum amount to presumptively constitute trafficking[,]" "two unlabeled pill bottles containing fifty-two (52) tablets of oxycodone," $431.00, a syringe, and two cell phones. *Id.* at *1-3. This court in *Carter* compared the facts before it to those in *Wilkins* and *Nettles*:

> We find the evidence at hand *substantially similar* to that in *Wilkins* and *Nettles*. *The State presented no evidence* that the 0.63 grams of methamphetamine, a very small amount, possessed by Defendant "was more than a drug user normally would possess for personal use." *No evidence was presented that the manner in which the methamphetamine was packaged [five separate baggies] was more consistent with Defendant intending to sell rather than having previously used the methamphetamine*. The $431.00 found on Defendant was almost two-thirds less than the *$1,264.00 found insufficient in Wilkins* to support an inference of intent to sell.[8] There was no evidence of other drug paraphernalia consistent with an intent to sell methamphetamine *such as weighing scales*, chemicals, *or empty plastic baggies*.[9]

Id. at *3 (emphasis added).

I find the evidence before us substantially similar to that in *Carter*, and would likewise find it "substantially similar to that in *Wilkins* and *Nettles*." *Id.* The amount of drugs recovered in *Nettles* and *Carter* was relatively *greater* than that recovered in the present case, though I would characterize the amounts recovered in all four cases as *de minimis*. The amount of cash recovered in each instance was significant, but not highly unusual. "There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs [in any of the four cases]." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176.

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8. $431.00 is slightly *more* than the amount of money recovered in *Nettles*.

9. In a footnote, this Court in *Carter* stated: "We note that the detectives found two cell phones when they searched Defendant. However, the State made no argument in its brief on appeal concerning the significance of Defendant's possession of these cell phones; and, therefore, we do not consider their significance either." *Carter*, 2017 WL 3027550 at *3, n. 1. I would note, in the present case, the State did not argue the significance of a number of the facts relied upon by the majority opinion, and I do not believe we should consider them.

Paraphernalia was found with the drugs in *Nettles* and *Carter*, but "[t]here was no evidence of other drug paraphernalia consistent with an intent to sell . . . such as weighing scales, chemicals, or empty plastic baggies." *Carter*, 2017 WL 3027550 at *3. No paraphernalia, consistent with an intent to sell or not, was found in *Wilkins* or the present case. The only potentially relevant difference that I can find between the facts in *Wilkins*, *Nettles*, *Carter*, and the present case, is the gun recovered from the glove compartment of Jones' Impala. However, for all the reasons discussed above, I do not believe the recovery of this gun serves to transmute this case from one lacking substantial evidence of an intent to sell into one including it.

III. *Conclusion*

At trial, the State presented evidence that Defendant was in possession of $1,504.00 and a small amount of marijuana, packaged in a manner consistent with personal use. The State also argues on appeal that we should consider the firearm recovered from the Impala, even though this evidence was not presented to the jury as evidence of any intent to sell. "The State points to no other [relevant] evidence or circumstances that in any way suggest that [D]efendant had an intent to sell or deliver the [marijuana]." *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24. "[W]hen the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Id.* at 158–59, 607 S.E.2d at 24 (citation omitted). This is true even if "the suspicion so aroused by the evidence is strong." *State v. Dulin*, __ N.C. App. __, __, 786 S.E.2d 803, 807 (2016) (citation omitted). I do not find the suspicion aroused by the evidence in the present case to be strong. I reach the same conclusion when fully considering the gun recovered from the glove compartment of Jones' Impala, and assuming the marijuana recovered from the center console was all "sellable."

The jury was also instructed on the lesser-included offense of possession of marijuana, Defendant admitted at trial that he possessed the marijuana, and the jury necessarily found that Defendant possessed the marijuana by convicting him of PWISD. "Consequently, [I would] vacate [D]efendant's sentence [of PWISD] and remand for entry of a judgment 'as upon a verdict of guilty of simple possession of marijuana.' " *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811 (citation omitted).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 AUGUST 2017)

BARBEE v. WHAP, P.A. No. 16-1154	Forsyth (14CVS4177)	Affirmed
DAVIS v. DAVIS No. 16-1159	Rowan (13CVD664)	Affirmed
GRISSOM v. COHEN No. 16-1177	Mecklenburg (07CVD314)	Reversed and Remanded
MEZA v. BCR JANITORIAL SERVS., INC. No. 16-944	N.C. Industrial Commission (893252)	Affirmed
NICHOLS v. UNIV. OF N.C. AT CHAPEL HILL No. 16-1117	Office of Admin. Hearings (16OSP6127)	Affirmed
STATE v. ALEXANDER No. 17-96	Buncombe (14CRS87408)	No prejudicial error.
STATE v. BONHAM No. 17-141	Forsyth (15CRS56356) (16CRS467)	NO PREJUDICIAL OR PLAIN ERROR
STATE v. BOULWARE No. 17-22	Mecklenburg (15CRS214094-95) (15CRS214099)	No Error
STATE v. GRAHAM No. 17-66	Iredell (15CRS53352)	No Error
STATE v. GRIFFIN No. 17-195	Beaufort (14CRS51682)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR NEW RESTITUTION HEARING.
STATE v. LINDSEY No. 17-218	Buncombe (15CRS93851-52)	Affirmed
STATE v. LINEBERGER No. 17-201	Catawba (14CRS4711) (14CRS54897) (14CRS54900) (14CRS54905)	Reversed and Remanded

STATE v. LOCKETT No. 16-1091	Mecklenburg (12CRS253254)	No Error
STATE v. METTLER No. 17-47	Forsyth (14CRS62057-58)	NO ERROR IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.
STATE v. MORRIS No. 17-121	Brunswick (15CRS53759) (16CRS20)	Affirmed; Remanded for correction of clerical errors.
STATE v. PETERSON No. 17-150	Forsyth (14CRS59028)	No Error
STATE v. RIOS No. 17-249	Mecklenburg (05CRS238682)	Affirmed
STATE v. ROLLAND No. 17-168	Mecklenburg (12CRS246706) (12CRS246707) (12IFS013038)	Dismissed
STATE v. SAYRE No. 17-68	Forsyth (14CRS111-112) (14CRS54508) (14CRS54510-13) (14CRS54515)	Affirmed
STATE v. SELLERS No. 17-252	Forsyth (13CRS50254-55) (13CRS50262-67) (13CRS50269-70) (13CRS50559-63)	Affirmed; Remanded for correction of clerical errors.
STATE v. SIMMONS No. 16-1065	Surry (12CRS1110-11)	VACATED IN PART AND REMANDED
STATE v. SMITH No. 17-306	New Hanover (15CRS59701) (16CRS1906)	No Error
STATE v. STEPHENS No. 16-714	Duplin (12CRS51892)	No Error
STATE v. WEBB No. 16-1228	Forsyth (13CRS61500)	No Error

STATE v. WILSON No. 16-1212	Forsyth (15CRS52586)	Reversed and Vacated.
STATE v. YARBOROUGH No. 17-177	Onslow (15CRS56078-79)	NO ERROR AT TRIAL; JUDGMENT REVERSED AND REMANDED FOR RESENTENCING.

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